DOCKET

No. 08-1322

Title: Michael J. Astrue, Commissioner of Social Security, Petitioner
v.
Catherine G. Ratliff

Docketed: April 28, 2009
Lower Ct: United States Court of Appeals for the Eighth Circuit
Case Nos.: (07-2317)
Decision Date: September 5, 2008
Rehearing Denied: December 5, 2008

Questions Presented

~~Date~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Feb 20 2009	Application (08A734) to extend the time to file a petition for a writ of certiorari from March 5, 2009 to April 6, 2009, submitted to Justice Alito.
Feb 23 2009	Application (08A734) granted by Justice Alito extending the time to file until April 6, 2009.
Mar 25 2009	Application (08A734) to extend further the time from April 6, 2009 to May 4, 2009, submitted to Justice Alito.
Mar 26 2009	Application (08A734) granted by Justice Alito extending the time to file until May 4, 2009.
Apr 28 2009	Petition for a writ of certiorari filed. (Response due May 28, 2009)
Apr 30 2009	Order extending time to file response to petition to and including June 29, 2009.
Jun 25 2009	Brief of respondent Catherine G. Ratliff in opposition filed.
Aug 12 2009	DISTRIBUTED for Conference of September 29, 2009.
Aug 13 2009	Reply of petitioner Michael J. Astrue, Commissioner of Social Security filed. (Distributed)
Aug 24 2009	Letter and attachment dated August 24, 2009, received from Solicitor General. (Distributed).
Sep 30 2009	Petition GRANTED.
Oct 13 2009	Motion to dispense with printing the joint appendix filed by petitioner.
Oct 22 2009	Letter from counsel for respondent proposing to lodge copies of the Memorandum Opinion and Order in Kills Ree v. Barnhart.
Nov 2 2009	Motion to dispense with printing the joint appendix filed by petitioner GRANTED.
Nov 3 2009	The time within which to file the joint appendix and petitioner's brief on the merits to and including November 20, 2009.
Nov 3 2009	The time within which to file respondent's brief on the merits is extended to and including December 30, 3009.
Nov 20 2009	Brief of petitioner Michael J. Astrue, Commissioner of Social Security filed.
Nov 30 2009	SET FOR ARGUMENT ON Monday, February 22, 2010.
Nov 30 2009	Letter from counsel for respondent regarding proposed lodging.
Dec 7 2009	CIRCULATED.
Dec 24 2009	The time within which to file respondent's brief on the merits is further extended to and including January 8, 2010.
Jan 8 2010	Record received from U.S.C.A for 8th Circuit. (1 envelope)
Jan 8 2010	Brief of respondent Catherine G. Ratliff filed. (Distributed)

Jan 15 2010	Brief amici curiae of National Organization of Social Security Claimants filed. (Distributed)
Feb 9 2010	Reply of petitioner Michael J. Astrue, Commissioner of Social Security filed. (Distributed)
Feb 19 2010	Record for U.S.D.C. for District of South Dakota is electronic.
Feb 22 2010	Argued. For petititioner: Anthony Yang, Assistant to the Solicitor General, Department of Justice, Washington, D. C. For respondent: James D. Leach, Rapid City, S. D.

PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED

081322 APR 28 2009

OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

MICHAEL J. ASTRUE,
COMMISSIONER OF SOCIAL SECURITY, PETITIONER

v.

CATHERINE G. RATLIFF

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an "award of fees and other expenses" under the Equal Access to Justice Act, 28 U.S.C. 2412(d), is payable to the "prevailing party" rather than to the prevailing party's attorney, and therefore is subject to an offset for a pre-existing debt owed by the prevailing party to the United States.

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In the Supreme Court of the United States

No.

MICHAEL J. ASTRUE,
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v.

CATHERINE G. RATLIFF

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Commissioner of Social Security, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-9a) is reported at 540 F.3d 800. The order of the district court (App., *infra*, 10a-16a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 5, 2008. A petition for rehearing was denied on December 5, 2008 (App., *infra*, 17a). On February 23, 2009, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including

April 6, 2009. On March 26, 2009, Justice Alito further extended the time to May 4, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Congress enacted the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412, to enable "certain prevailing parties to recover an award of attorney fees, expert witness fees and other expenses against the United States" in appropriate cases. H.R. Rep. No. 1418, 96th Cong., 2d Sess. 6 (1980). EAJA authorizes the court in a civil action to "award to a prevailing party other than the United States fees and other expenses * * * incurred by that party" if the position of the United States is not substantially justified and no special circumstances would make an award unjust. 28 U.S.C. 2412(d)(1)(A).

Before a court may "award [fees and other expenses] to a prevailing party," 28 U.S.C. 2412(d)(1)(A), the "party seeking [such] an award" must submit an application that, *inter alia*, "shows that the party is a prevailing party and is eligible to receive an award under [EAJA]." 28 U.S.C. 2412(d)(1)(B). The applicant for a fee award must therefore demonstrate that it falls within EAJA's definition of "party"—*i.e.*, that it is an individual or small business whose net worth when the action was filed did not exceed $2 million or $7 million, respectively, or a non-profit organization meeting specific criteria. 28 U.S.C. 2412(d)(2)(B). The applicant must also document "the amount sought" by providing in its application "an itemized statement from any attorney or expert witness representing or appearing on behalf of the party." 28 U.S.C. 2412(d)(1)(B).

In civil actions for review of final decisions rendered by the Social Security Administration, Congress has separately authorized awards of reasonable attorney fees in 42 U.S.C. 406(b). When a successful Social Security claimant "who was represented before the court by an attorney" obtains a favorable judgment, "the court may determine and allow as part of its judgment a reasonable fee for such representation, not in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment." 42 U.S.C. 406(b)(1)(A). If an attorney fee is awarded under that provision, the Commissioner of Social Security (Commissioner) may certify the amount of such fee "for payment to such attorney out of * * * the amount of" the past-due benefits owed to the claimant. *Ibid.* In cases in which awards are made under both EAJA and Section 406(b), "the claimant's attorney must 'refun[d] to the claimant the amount of the smaller fee.'" *Gisbrecht* v. *Barnhart*, 535 U.S. 789, 796 (2002) (quoting Act of Aug. 5, 1985, Pub. L. No. 99-80, § 3, 99 Stat. 186) (brackets in original).

b. The Department of the Treasury, through the Financial Management Service (FMS), operates a centralized delinquent debt collection program known as the Treasury Offset Program. When a federal agency requests that Treasury pay a government obligation, the offset program compares the payee's name and taxpayer identifying number to the names and taxpayer identifying numbers on delinquent debts that federal and state agencies have certified to Treasury as valid, delinquent, and legally enforceable. If the payee is matched to such a debt, the government's payment may be reduced to satisfy the debt pursuant to pertinent authority. See generally, *e.g.*, 5 U.S.C. 5514 (reductions from federal

salary); 26 U.S.C. 6331 (levy for federal tax debts), 6402(c)-(e) (reductions from tax refunds); 31 U.S.C. 3716 (administrative offset for non-tax debts), 3720A (reductions from tax refunds); 26 C.F.R. 301.6331-1 (tax levy); 31 C.F.R. 285.1-285.8 (offset regulations).[1] In January 2005, FMS extended its offset program to so-called "miscellaneous" payments, which include government payments for EAJA awards.

2. Respondent is an attorney who represented two Social Security claimants, Ruby Willow Kills Ree and Michael Randall, in separate civil actions challenging the denial of Social Security benefits. App., *infra*, 18a; C.A. App. 18, 21. Kills Ree and Randall both prevailed in their actions and obtained awards of fees and other expenses under EAJA. *Id.* at 27-28 (Randall); App., *infra*, 23a (Kills Ree).

As is pertinent here, the district court granted Kills Ree's unopposed motion for EAJA fees and ordered the Commissioner to "pay [Kills Ree's] claim for EAJA fees in the amount of $2,112.60 in attorney fees" and $126.75 in "other expense[s]." App., *infra*, 23a. The court directed that "[j]udgment shall be entered in favor of the Plaintiff [Kills Ree] and against the [Commissioner] accordingly." *Ibid.*

The Commissioner subsequently transmitted a request to FMS that Treasury pay the EAJA award to Kills Ree, and FMS matched Kills Ree to a delinquent

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[1] The United States also may exercise a common-law right to reduce its payment by offset for a debt owed to it by a payee. See *United States* v. *Munsey Trust Co.*, 332 U.S. 234, 239 (1947) ("The government has the same right 'which belongs to every creditor, to apply the unappropriated moneys of his debtor, in his hands, in extinguishment of the debts due to him.'") (citation omitted); 31 U.S.C. 3716(d); cf. *Citizens Bank* v. *Strumpf*, 516 U.S. 16, 18 (1995) (discussing offset).

non-tax federal debt that she owed to the government. See App., *infra*, 21a-22a. On January 31, 2006, FMS mailed Kills Ree a notice explaining that her creditor agency had previously mailed to her a separate notice explaining the amount and type of debt that she owed, her rights associated with that debt, and the agency's intent to collect the debt by intercepting future federal payments to her. *Ibid.*; see 31 U.S.C. 3716(a)(1); 31 C.F.R. 285.5(d)(6)(ii). The notice further explained that Kills Ree's $2239.35 EAJA award had been offset in its entirety to satisfy that pre-existing federal debt. App., *infra*, 22a.

3. a. On September 11, 2006, respondent initiated the present action under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, challenging the offset as contrary to law. App., *infra*, 19a. Respondent's complaint alleged that respondent "was awarded attorney fees under [EAJA]" as counsel for Kills Ree, and that the Commissioner had unlawfully seized that award "to satisfy debts allegedly owed by [Kills Ree] to the government." *Id.* at 18a-19a.[2]

The district court granted the government's motion to dismiss. App., *infra.*, 10a-16a. The court held that, under the plain terms of the statute, EAJA awards are payable to the "prevailing party" rather than to that

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[2] Respondent also challenged a $866.02 reduction taken from the $6160.37 EAJA award obtained by respondent's other client, Michael Randall. App., *infra*, 19a; see C.A. App. 27-28 (EAJA award); *id.* at 30 (notice of reduction). In the course of preparing this petition for a writ of certiorari, the government has identified an independent barrier to the use of the offset mechanism with respect to Randall's EAJA award. The government has determined that it will refund the money associated with that reduction and does not seek further review of that portion of this case.

party's attorney. *Id.* at 12a-13a. The court concluded that respondent "must seek the fees from her clients" directly and lacked standing to bring the present suit because she had not sustained an injury in fact from governmental action. *Id.* at 13a.

b. The court of appeals reversed. App., *infra*, 1a-9a. The court held that "EAJA fee awards become the property of the prevailing party's attorney when assessed and may not be used to offset the claimant's debt." *Id.* at 4a. The court acknowledged that its holding conflicted with decisions of other courts of appeals, including *Manning* v. *Astrue*, 510 F.3d 1246 (10th Cir. 2007), cert. denied, 129 S. Ct. 486 (2008), and *Reeves* v. *Astrue*, 526 F.3d 732 (11th Cir.), cert. denied, 129 S. Ct. 724 (2008). App., *infra*, 2a-3a. The court also stated that, if it were not constrained by circuit precedent, it might "well agree with [its] sister circuits and be persuaded by a literal interpretation" of EAJA's text awarding fees to the "prevailing party." *Id.* at 3a. The court determined, however, that "controlling Eighth Circuit precedent" compelled the conclusion that "attorneys' fees awarded under the EAJA are awarded to the prevailing parties' attorneys, rather than to the parties themselves." *Id.* at 1a-2a; see *id.* at 3a-4a (discussing precedent). The court therefore ruled that respondent had "standing to bring an independent action to collect the fees," and, on the merits, that the government had violated the Fourth Amendment by unreasonably seizing respondent's EAJA fee awards to satisfy the debts of her clients. *Id.* at 4a.

Judge Gruender concurred in the court's judgment. App., *infra*, 4a-9a. He explained, however, that his concurrence was based solely on circuit precedent, and that the court's holding was "inconsistent with language in

two Supreme Court opinions, the EAJA's plain language, and the holdings of most other circuit courts." *Id.* at 5a; see *id.* at 5a-6a (discussing *Evans* v. *Jeff D.*, 475 U.S. 717, 731-732 (1986), and *Venegas* v. *Mitchell*, 495 U.S. 82, 87-89 (1990)); *id.* at 9a (explaining that "the majority of other circuit courts to consider the issue * * * hold that awards of attorney's fees belong to the client as the prevailing party, not to the attorney").

The court of appeals subsequently denied rehearing en banc, with five of the court's 11 active judges voting in favor of en banc review. App., *infra*, 17a.

REASONS FOR GRANTING THE PETITION

The decision of the court of appeals is incorrect and squarely conflicts with decisions of the Tenth and Eleventh Circuits. Those courts have held that because EAJA awards are payable to the prevailing party rather than to that party's attorney, such awards are subject to offset to collect pre-existing debts owed by the prevailing party. EAJA's text makes clear that attorney fees and other expenses may be awarded "to a prevailing party," and it specifically distinguishes between that party and an attorney who represents her. The decision below is also in substantial tension with the decisions of this Court, which have explained that Congress, by authorizing awards of attorney fees to prevailing parties under 42 U.S.C. 1988, bestowed fee-award eligibility on those parties (rather than their lawyers), who may waive, settle, or negotiate away a potential award in order to obtain other benefits from opposing litigants.

The question presented has arisen frequently since 2005, when changes in the Treasury Offset Program first allowed the government to identify EAJA award payments as subject to reduction for offsetting debts.

As a result of the division in the lower courts, the federal government currently is exposed to recurrent collateral litigation to determine the appropriate payee of an EAJA award and the permissibility of an offset for a pre-existing debt. A uniform national rule is necessary for the proper implementation of the Treasury Offset Program in this context. This Court's review is thus warranted.

1. The decision of the court of appeals is incorrect.

a. EAJA provides that, in circumstances in which an award is appropriate and "[e]xcept as otherwise specifically provided by statute, a court shall award *to* a *prevailing party* * * * fees and other expenses * * * *incurred by that party*." 28 U.S.C. 2412(d)(1)(A) (emphases added). This Court recently explained that the same language in EAJA's provision governing administrative proceedings emphasizes party status and "leaves no doubt" that Congress intended that EAJA awards be determined from "the perspective of the litigant" rather than from that of her attorney. *Richlin Sec. Serv. Co.* v. *Chertoff*, 128 S. Ct. 2007, 2013 (2008). The Tenth and Eleventh Circuits have likewise held that the equivalent language in Section 2412(d) "unambiguously directs the award of attorney's fees to the party who incurred those fees and not to the party's attorney." *Reeves* v. *Astrue*, 526 F.3d 732, 735 (11th Cir.), cert. denied, 129 S. Ct. 724 (2008); accord *Manning* v. *Astrue*, 510 F.3d 1246, 1249-1250 (10th Cir. 2007) (EAJA's "language clearly provides that the prevailing party, who incurred the attorney's fees, and not that party's attorney, is eligible for an award of attorney's fees."), cert. denied, 129 S. Ct. 486 (2008).

EAJA's other provisions confirm that a litigant, rather than her attorney, is the proper recipient of a fee

award. For instance, Congress expressly conditioned a federal court's authority to direct the payment of an EAJA award on the prevailing party's net worth—not that of her attorney. See 28 U.S.C. 2412(d)(2)(B) (defining "party"); *Reeves*, 526 F.3d at 736; *Manning*, 510 F.3d at 1251. Indeed, EAJA specifically states that a fee application must show that "the party" (rather than the party's attorney) both is a "prevailing party" and "is eligible to receive an award under [EAJA]." 28 U.S.C. 2412(d)(1)(B). The Eighth Circuit's conclusion that "attorneys' fees awarded under the EAJA are awarded to the prevailing parties' attorneys, rather than to the parties themselves," App., *infra*, 1a-2a, cannot be reconciled with those provisions.

Moreover, Congress expressly distinguished between the "prevailing party" who is "eligible to receive" a fee award and the attorney who represents that party. EAJA directs that the party seeking fees must submit an application establishing "the amount sought, including an itemized statement from any attorney or expert witness representing or appearing in behalf of the party" that, *inter alia*, details the attorney's hourly rate and time expended on the case. 28 U.S.C. 2412(d)(1)(B). That distinction between the "party" and her "attorney" was not inadvertent. Rather, EAJA treats attorneys in the same manner as it treats expert witnesses and other professional specialists who may be necessary for a party to litigate a case. See *Reeves*, 526 F.3d at 736 (citing *Panola Land Buying Ass'n* v. *Clark*, 844 F.2d 1506, 1511 (11th Cir. 1988) (*Panola*)); *Manning*, 510 F.3d at 1251.

The statute thus makes clear that a prevailing party may recover "fees and other expenses," which include "the reasonable expenses of expert witnesses, the rea-

sonable cost of any study, analysis, engineering report, test, or project which is found by the court to be necessary for the preparation of the party's case, and reasonable attorney fees." 28 U.S.C. 2412(d)(2)(A). Nothing in EAJA suggests that Congress intended that "all [such] persons performing services for the prevailing party in the litigation" might separately "assert their claims for compensation" against the government. *Panola*, 844 F.2d at 1511. Rather, those professionals—including attorneys—must obtain their compensation from the party who utilized their services. *Ibid.*; see *Oguachuba* v. *INS*, 706 F.2d 93, 97-98 (2d Cir. 1983).

Had Congress intended for EAJA awards to be payable directly to the attorneys who provide the relevant services, it presumably would have used language similar to that in 42 U.S.C. 406(b), which Congress enacted before EAJA and which authorizes the Commissioner to make direct "payment *to [the prevailing party's] attorney* out of * * * the amount of [the] past-due benefits" awarded to that party by a court. 42 U.S.C. 406(b)(1)(A) (emphasis added). Congress did not do so, and its decision reflects sound policy. In many EAJA contexts, a party may pay some or all of her attorney's bills during the course of litigation; an attorney may owe her client an unrelated debt; or the party and her attorney may dispute the appropriate amount of professional fees owed under their fee agreement. By making EAJA awards payable to the prevailing party, Congress avoided the need to provide for resolution of such issues under EAJA. Rather, disputes between EAJA award recipients and their attorneys concerning their obligations to each other are resolved under applicable non-EAJA law.

b. That conclusion is reinforced by this Court's attorney fee decisions under 42 U.S.C. 1988. The Court has explained that Section 1988, by authorizing courts to "allow the prevailing party * * * a reasonable attorney's fee as part of the costs," 42 U.S.C. 1988(b), makes "the party, rather than the lawyer," eligible for fee awards. *Venegas* v. *Mitchell*, 495 U.S. 82, 87 (1990); accord *Evans* v. *Jeff D.*, 475 U.S. 717, 730-732 (1986) (Section 1988 does not "bestow[] fee awards upon attorneys."). The Court therefore has "rejected the argument that the entitlement to a § 1988 award belongs to the attorney rather than the plaintiff," *Venegas*, 495 U.S. at 89 (citing *Jeff D.*, 475 U.S. at 731-732), holding instead that a plaintiff may use a potential fee award as a "bargaining chip" that she may waive, settle, or negotiate away to obtain other benefits for herself. *Jeff D.*, 475 U.S. at 731 & n.20; see *Venegas*, 495 U.S. at 88. That conclusion is in significant tension with the court of appeals' holding that EAJA awards are payable directly to the attorney. App., *infra*, 5a-6a, 9a (Gruender, J., concurring) (concluding that "today's holding is in conflict with the repeated statements of the Supreme Court" in *Jeff D.* and *Venegas*, which "undermine[]" the conclusion that "EAJA attorney's fees are awarded to a prevailing party's attorney").

The Court's reasoning in *Venegas* and *Jeff D.* is significant in the EAJA context because this Court normally construes "prevailing party" fee-shifting provisions similarly, see *Buckhannon Bd. & Care Home, Inc.* v. *West Va. Dep't of Health & Human Res.*, 532 U.S. 598, 603 n.4 (2001); *City of Burlington* v. *Dague*, 505 U.S. 557, 562 (1992); *Independent Fed'n of Flight Attendants* v. *Zipes*, 491 U.S. 754, 758 n.2 (1989); *Hensley* v. *Eckerhart*, 461 U.S. 424, 433 n.7 (1983), and has done so

with respect to EAJA and Section 1988. See *Richlin*, 128 S. Ct. at 2014-2015 (construing EAJA to have the same meaning as similar text in Section 1988). It would be anomalous to do otherwise here, particularly given the additional textual indications in EAJA (see pp. 8-10, *supra*) that Congress intended EAJA fees and expenses to be paid to the prevailing party.

c. Because the EAJA award in this case was payable to Kills Ree rather than to her attorney, that award, like most federal payments, was subject to an administrative offset to collect the pre-existing debt that Kills Ree owed to the United States. As the Tenth Circuit has explained, "[a]ll federal payments, including 'fees,' are subject to administrative offset," except for payments that are specifically listed as exceptions to that general rule. *Manning*, 510 F.3d at 1255 (citing 31 C.F.R. 285.5(e)(1) and (2)); see 31 U.S.C. 3701(b) and (d); 31 U.S.C. 3716(c)(1), (3)(A)-(B) and (6); 31 C.F.R. 285.5(d)(1), (2), (6), (e)(1) and (2). Neither EAJA nor the statutory and regulatory provisions governing the administrative-offset process exempt from the offset mechanism the EAJA award at issue here. See *Manning*, 510 F.3d at 1255; App., *infra*, 8a-9a (Gruender, J., concurring).

d. The court of appeals made no attempt to reconcile its decision with EAJA's language. In fact, the court appeared to recognize that a "literal interpretation of the EAJA" supported the government's position in this case. App., *infra*, 3a. The court declined to adopt that interpretation only because it viewed itself as bound by Eighth Circuit precedent. *Ibid.*

Both cases cited by the court—*Curtis* v. *City of Des Moines*, 995 F.2d 125 (8th Cir. 1993), and *United States* v. *McPeck*, 910 F.2d 509 (8th Cir. 1990)—involved fee-

shifting provisions other than EAJA, and those decisions provide no textual analysis that might extend by analogy to the present case. Cf. App., *infra*, 3a-4a; *id.* at 5a & n.1 (Gruender, J., concurring). The decision in *Curtis* contains two paragraphs of analysis to support its conclusion that Section 1988 fees belong to the attorney because the purpose of the statute is to "encourage attorneys to prosecute constitutional violations." 995 F.2d at 128-129. That atextual analysis is problematic even in the Section 1988 context, where the Court indicated in *Venegas* and *Jeff D.* that fee awards belong to the prevailing party rather than her attorney. See pp. 10-11, *supra*. Indeed, the Court in *Jeff D.* confronted an argument similar to that adopted in *Curtis* and rejected the view that permitting "clients to bargain away fee awards" would significantly undermine Section 1988's purpose by deterring lawyers from representing civil rights plaintiffs. *Jeff D.*, 475 U.S. at 741 n.34.[3] The analysis in *McPeck* provides even less support for the court of appeals' ruling here. The court in *McPeck* addressed a fee award imposed as a sanction in bankruptcy proceedings; concluded that "EAJA [is] inapplicable to th[e] case"; and adopted the government's position that, "[w]hen a statute awards attorneys' fees to a party, the award belongs to the party, not to the attorney representing the party." 910 F.2d at 513.

2. The Eighth Circuit's ruling in this case squarely conflicts with decisions of the Tenth and Eleventh Circuits. App., *infra*, 2a-3a. As noted, the courts in *Reeves* and *Manning* held that EAJA fees are payable to the prevailing party rather than to her attorney. See

[3] Although *Curtis* cites *Jeff D.* and *Venegas*, it does not explain how its holding is consistent with the reasoning in those decisions. See 995 F.2d at 128-129.

Reeves, 526 F.3d at 734-738; *Manning*, 510 F.3d at 1249-1255. Those courts further held that because an EAJA award is payable to the prevailing party, it is subject to an offset to collect a pre-existing debt owed by that party to the United States or another eligible creditor. See *Reeves*, 526 F.3d at 738; *Manning*, 510 F.3d at 1255-1256.[4]

The court of appeals' disallowance of the offset in this case is consistent with the decision of the Fifth Circuit in *Marré* v. *United States*, 117 F.3d 297 (1997). The court in *Marré* held that, although a fee award under 26 U.S.C. 7430 is made to a "prevailing party," that statutory directive "is not controlling" because "the real part[ies] in interest vis-a-vis attorneys' fees awarded under the statute are the attorneys themselves," such that "the prevailing party is only nominally the person who receives the award." 117 F.3d at 304. Concluding that "the fee once awarded becomes in effect an asset of the attorney," the court held that the government could not offset a federal debt owed by the prevailing party from fees awarded under Section 7430. *Id.* at 304-305 & n.11 (citation omitted).

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[4] The Federal Circuit, while not addressing the question whether an award of attorney fees may be offset to collect a pre-existing debt owed by the prevailing party, likewise has held that fee awards under EAJA and comparable statutes are payable to the prevailing party rather than to her attorney. See *FDL Techs., Inc.* v. *United States*, 967 F.2d 1578, 1580 (Fed. Cir. 1992); App., *infra*, 3a. The Ninth Circuit also recently followed *Reeves* in denying a request that EAJA "fees be directly awarded to counsel." *Lozano* v. *Astrue*, No. 06-15935, 2008 WL 5875572, at *1 (9th Cir. July 18, 2008) (unpublished panel order; citing *Reeves*); see *Lozano* v. *Astrue*, No. 06-15935, 2008 WL 5875573, at *1 (9th Cir. Sept. 4, 2008) (EAJA award by appellate commissioner). That unpublished decision does not constitute binding precedent and need not be followed by future panels. See 9th Cir. R. 36-3(a).

Although *Marré* (unlike the decision below) involved a different fee-shifting statute and therefore does not squarely conflict with *Manning* and *Reeves*, Section 7430 was largely modeled on EAJA and expressly incorporates EAJA's definitions of "party" and "prevailing party." See 26 U.S.C. 7430(a); see also 26 U.S.C. 7430(c)(4) (defining the term "prevailing party" by referencing 28 U.S.C. 2412(d)(1)(B) and (2)(B)). In its administration of the Treasury Offset Program, the government therefore has treated *Marré* as precluding (within the Fifth Circuit) use of the offset mechanism to offset debts owed by the prevailing party against EAJA awards. The Eighth Circuit itself appears to have interpreted *Marré* as resolving the question presented here, describing *Marré* as ruling that "the government cannot offset attorneys' fees in an EAJA case because 'the prevailing party is only nominally the person who receives the award.'" See App., *infra*, 4a (quoting *Marré*, 117 F.3d at 304). In any event, the Eighth Circuit's decision in this case, in part based on the Fifth Circuit's ruling in *Marré*, creates a clear circuit split that warrants resolution by this Court.[5]

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[5] The government previously acknowledged in its briefs in opposition to the petitions for writs of certiorari in *Manning* and *Reeves* that the Eighth Circuit's decision in *Ratliff* had created a conflict with the Tenth and Eleventh Circuits' decisions. The government explained, however, that review was premature at that time because, if the Eighth Circuit granted rehearing en banc in *Ratliff*, the division of authority might be eliminated. The Court denied certiorari in *Manning* on November 3, 2008. 129 S. Ct. 486 (No. 07-1468). The court of appeals denied rehearing en banc in this case on Friday, December 5, 2008 (App., *infra*, 17a), and the government advised this Court of that denial by letter filed the same day. The Court denied certiorari in *Reeves* on Monday, December 8, 2008. 129 S. Ct. 724 (No. 08-5605).

3. The question presented in this case is significant and recurring. The government is frequently ordered to pay EAJA awards in civil actions and, since the Treasury Offset Program was extended to EAJA awards in 2005, litigants commonly seek to have payment of such awards made directly to counsel. In addition to producing a circuit split, see pp. 13-15, *supra*, the issue is the subject of several pending appeals[6] and has spawned multiple internal conflicts within district courts.[7] As a result, even after EAJA fee applications have been adjudicated, the United States is exposed to recurring satellite litigation to identify the proper payee for the fee award and to determine whether an offset may be taken to collect a pre-existing debt owed by the prevailing party. Review by this Court is warranted to resolve the circuit conflict and to alleviate the practical burdens associated with those disputes.

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[6] See, *e.g.*, *Stephens* v. *Astrue*, 539 F. Supp. 2d 802, 805 (D. Md. 2008), appeal pending, No. 08-1527 (4th Cir.) (argued Mar. 26, 2009); *Bryant* v. *Astrue*, No. 07-CV-209, 2008 WL 4186892, at *1-*2 (E.D. Ky. Sept. 10, 2008), appeal pending, No. 08-6375 (6th Cir.); *Thompson* v. *Astrue*, No. 06-CV-237A, 2009 WL 537512, at *2-7 (W.D.N.Y. Mar. 3, 2009), notice of appeal filed (Apr. 21, 2009); *Abeytia* v. *Astrue*, No. 06-CV-2185 (D. Ariz. Mar. 23, 2009), notice of appeal filed (Apr. 21, 2009).

[7] See, *e.g.*, *Thompson*, 2009 WL 537512, at *2 (noting intra-district conflict in W.D.N.Y.); compare, *e.g.*, *Walker* v. *Astrue*, No. 04-CV-891, 2008 WL 4693354, at *7 (N.D.N.Y. Oct. 23, 2008) (EAJA awards are paid to prevailing party); *Riggins* v. *Commissioner of Soc. Sec.*, No. 07-CV-2116, 2008 WL 4822225, at *2 (D.N.J. Nov. 3, 2008) (same), with *Spencer* v. *Commissioner of Soc. Sec.*, No. 03-CV-733, 2009 WL 1011629, at *1-*4 (N.D.N.Y. Apr. 15, 2009) (EAJA awards are paid to attorney for prevailing party); and *Williams* v. *Commissioner of Soc. Sec.*, 549 F. Supp. 2d 613, 615-621 (D.N.J. 2008) (same).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 2009

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 07-2317

CATHERINE G. RATLIFF, PLAINTIFF-APPELLANT

v.

MICHAEL J. ASTRUE, COMMISSIONER
OF SOCIAL SECURITY, DEFENDANT-APPELLEE

Appeal from the United States District Court
for the District of South Dakota

Filed: September 5, 2008

Before MELLOY, GRUENDER, and SHEPHERD, Circuit Judges.

MELLOY, Circuit Judge.

Plaintiff Catherine G. Ratliff, an attorney, appeals from a district court judgment allowing the government to offset an award of attorney's fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(b), against debts her clients owe the federal government. Based on controlling Eighth Circuit precedent, we conclude that attorneys' fees awarded under the EAJA are awarded to the prevailing parties' attorneys, rather than

to the parties themselves, and therefore cannot be used to offset the parties' debts to the government. Thus, we reverse the judgment of the district court.

I.

Ratliff successfully represented two claimants in their efforts to receive benefits from the Social Security Administration. She then moved for the award of fees and costs under the EAJA. The court granted the fees. The government reduced the fee award because of debts the claimants owed the United States government. Ratliff alleged this was an illegal seizure prohibited by the Fourth Amendment. The district court determined that because the fees were awarded to the parties, not their attorney, Ratliff lacked standing to challenge the government's offset.

II.

We review the district court's judgment de novo. *Emergency Med. Servs., Inc. v. St. Paul Mercury Ins. Co.*, 495 F.3d 999, 1009 (8th Cir. 2007) (reviewing de novo the district court's interpretation of a fee-shifting statute); *Jones v. Gale*, 470 F.3d 1261, 1265 (8th Cir. 2006) ("We review the district court's conclusion that the plaintiffs had standing *de novo*.").

Based on controlling Eighth Circuit precedent, we conclude that the attorney's fees in this case are awarded to the parties' attorney. We recognize that many courts have reached the opposite conclusion. *See Reeves v. Astrue*, 526 F.3d 732, 733 (11th Cir. 2008) (concluding in a social security EAJA case that "the statute unambiguously grants an award to the 'prevailing party'" and thus "hold[ing] the award belongs, in the first instance,

to the party and not the party's attorney"); *Manning v. Astrue*, 510 F.3d 1246, 1249-50 (10th Cir. 2007) (holding that under the plain language of the EAJA, the government can offset attorney's fees by the social-security claimant's debt); *FDL Techs., Inc. v. United States*, 967 F.2d 1578, 1580 (Fed. Cir. 1992) (noting the EAJA provides fees [*sic*] are awarded "*to a prevailing party*, not the prevailing party's attorney," and "[t]hus, under the language of the statute, the prevailing party, and not its attorney, is entitled to receive the fee award"); *Panola Land Buying Ass'n v. Clark*, 844 F.2d 1506, 1510 (11th Cir. 1988) (noting in an EAJA case that "[i]n employing the 'prevailing party' language, Congress recognized that throughout our history litigation costs generally have been awarded to the prevailing party"). Were we deciding this case in the first instance, we may well agree with our sister circuits and be persuaded by a literal interpretation of the EAJA, providing that "a court may award reasonable fees and expenses of attorneys . . . *to the prevailing party*." 28 U.S.C. § 2412(b) (emphasis added).

However, case law from this circuit compels a contrary conclusion. In *Curtis v. City of Des Moines*, 995 F.2d 125, 129 (8th Cir. 1993), we held that EAJA attorneys are entitled to fees awards; thus, the fees could not be recovered by a third-party judgment creditor of the plaintiff. This also holds true if the judgment creditor is the government. *United States v. McPeck*, 910 F.2d 509, 514 (8th Cir. 1990). In *McPeck*, we remanded and directed the bankruptcy court to "determine whether attorneys' fees can be awarded" under the Internal Revenue Code and, if so, specifically directed that "the award of attorneys' fees should be assessed affirmatively against the [government], and not as an offset against its

tax claim." *Id.* Applying *Curtis* and *McPeck*, we hold EAJA fee awards become the property of the prevailing party's attorney when assessed and may not be used to offset the claimant's debt. *See also Marre v. United States*, 117 F.3d 297, 304 (5th Cir. 1997) (holding the government cannot offset attorneys' fees in an EAJA case because "the prevailing party is only nominally the person who receives the award; the real party in interest vis-á-vis attorneys' fees awarded under the statute are the attorneys themselves").

III.

Because we hold EAJA attorneys' fees are awarded to prevailing parties' attorneys, we find that Ratliff has standing to bring an independent action to collect the fees and that the government's withholding of the fee awards to cover the claimants' debts was in violation of the Fourth Amendment. We reverse the judgment of the district court and remand for proceedings consistent with this opinion.

GRUENDER, Circuit Judge, concurring.

I concur in the Court's judgment because I agree that we are bound by our prior decision in *Curtis* and that *Curtis* compels the conclusion that EAJA attorney's fees are awarded to the party's attorney. While *Curtis* involved the award of attorney's fees under 42 U.S.C. § 1988 and not the EAJA, *see* 995 F.2d at 128-29, *Curtis*'s holding applies to this EAJA case because these "fee-shifting statutes' similar language is a strong indication that they are to be interpreted alike," *Independent Federation of Flight Attendants v. Zipes*, 491 U.S. 754, 758 n.2 (1989). *See also Northcross v. Bd. of Educ.*

of Memphis City Sch., 412 U.S. 427, 428 (1973) ("[S]imilarity of language . . . is, of course, a strong indication that . . . two [attorney's fee] statutes should be interpreted *pari passu*."). Furthermore, the *Curtis* court's conclusion that the attorneys were entitled to the fees without regard to the priority of the judgment creditor's claim necessarily means that the attorneys' fees were awarded to and belonged to the attorneys and not the party they represented. Had the fee award ever belonged to the party, the court would have been required to analyze the priority of the competing claims. Accordingly, I agree with the Court that *Curtis* compels the conclusion that the attorney's fees awarded pursuant to the EAJA are awarded to the attorney, not her clients.[1]

I write separately to emphasize that our holding today, as compelled by *Curtis*, is inconsistent with language in two Supreme Court opinions, the EAJA's plain language, and the holdings of most other circuit courts. In *Evans v. Jeff D.*, the Supreme Court stated that "the language of [§ 1988], as well as its legislative history,

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[1] On the other hand, I am not convinced that our *McPeck* decision compels the conclusion reached today. *McPeck* recognizes that "[w]hen a statute awards attorneys' fees to a party, the award belongs to the party, not to the attorney representing the party." 910 F.2d at 513. In remanding the case for the district court to determine whether the attorney's fees could be awarded pursuant to the Internal Revenue Code, rather than the Bankruptcy Code, the court stated that, "[i]f so, the award of attorneys' fees should be assessed affirmatively against the IRS, and not as an offset against its tax claim." 910 F.2d at 514. However, in the context of that bankruptcy case, it is not at all clear to me that the court's statement implied that the fees are to be awarded directly to the attorneys and not to the party or the bankruptcy estate. In addition, *McPeck* did not involve attorney's fees awarded under either the EAJA or § 1988. Moreover, because this statement is not necessary to the outcome, I respectfully suggest that it is dicta.

indicates that Congress bestowed on the 'prevailing party' . . . eligibility for a discretionary award of attorney's fees in specified civil rights actions. 475 U.S. 717, 730 (1986). Several years later, in *Venegas v. Mitchell*, the Supreme Court reiterated its earlier statement, saying that it "[had] recognized that it is the party's entitlement to receive the fees in the appropriate case," 495 U.S. 82, 88 (1990) (citing *Evans*, 475 U.S. at 730-31), and "[had] already rejected the argument that the entitlement to a § 1988 award belongs to the attorney rather than the plaintiff," *id.* at 89 (citing *Evans*, 475 U.S. at 731-32). This language undermines *Curtis*'s implicit holding that attorney's fees awarded under § 1988 are awarded to a prevailing party's attorney, as well as our conclusion today that EAJA attorney's fees are awarded to a prevailing party's attorney. *See Manning*, 510 F.3d at 1249-50 (citing *Venegas* and *Evans*, among other cases, in support of the proposition that the EAJA's language "clearly provides that the prevailing party, who incurred the attorney's fees, and not that party's attorney, is eligible for an award of attorney's fees").

Further, our conclusion that EAJA attorney's fees are awarded to a prevailing party's attorney also contradicts the plain language of the EAJA. In interpreting a statute we first "determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). If so, we apply the plain language of the statute. *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002). The EAJA provides that "a court may award reasonable fees and expenses of attorneys . . . *to the prevailing party* . . . ." 28 U.S.C. § 2412(b) (emphasis added). The EAJA clearly states that the attorney's reasonable fees and expenses

are awarded directly to the prevailing party and does not authorize a court to award fees and expenses to the attorney. I recognize the policy argument that Congress created the EAJA to encourage attorneys to provide representation in certain cases where they might otherwise be unwilling and that to hold that the attorney's fees belong to the client might frustrate this purpose. *See Evans*, 475 U.S. at 731 ("[W]hile it is undoubtedly true that Congress expected fee shifting to attract competent counsel to represent citizens deprived of their civil rights, it neither bestowed fee awards upon attorneys nor rendered them nonwaivable or nonnegotiable."); *Curtis*, 995 F.2d at 129. Nonetheless, the plain language of the EAJA awards the attorney's fees to a prevailing party, not the prevailing party's attorney. Congress has elsewhere demonstrated that it is capable of explicitly directing the awarding of attorney's fees to attorneys. *See* 42 U.S.C. § 406(b)(1) ("Whenever a court renders a judgment favorable to a claimant . . . who was represented before the court by an attorney, the court may determine and allow . . . a reasonable fee for such representation, . . . and the Commissioner of Social Security may . . . certify the amount of such fee for payment *to such attorney* . . . .") (emphasis added). Congress knows how to ensure that attorney's fees be awarded directly to the attorney and plainly chose to award the fees to the party when it enacted the EAJA. *See Manning*, 510 F.3d at 1251-52.

In addition, as discussed by the Tenth Circuit in its thorough and well-reasoned opinion holding that attorney's fees awarded under the EAJA belong to the party and not the party's attorney, "in defining fees and other expenses, the EAJA treats attorneys in the same manner as it treats expert witnesses, engineers, scientists,

analysts, or other persons found by the court to be needed to prepare the case." *Id.* at 1251 (internal quotations omitted). In support of this proposition, the court cited *Panola Land Buying Association*, in which the Eleventh Circuit stated, "Congress did not intend that all persons performing services to the prevailing party in the litigation be allowed to become parties in the case to assert their claims for compensation. Those persons look to the party that obtained their service—just as does the attorney for the party." 844 F.2d at 1511. The EAJA also requires the prevailing party, not the attorney, to submit an itemized list of expenses from the attorney including the time expended and the fee rate, supporting the proposition that it is "settled law that the attorney does not have standing to apply for the EAJA fees; that right belongs to the prevailing party." *Manning*, 510 F.3d at 1252 (citing *Oguachuba v. INS*, 706 F.2d 93, 97-98 (2d Cir. 1983)). Finally, the EAJA conditions eligibility for an award of attorney's fees on the prevailing parties' having a net worth of less than two million dollars. 28 U.S.C. § 2412(d)(2)(B); *see Manning*, 510 F.3d at 1251. "The EAJA therefore permits attorney's fees reimbursement to financially eligible prevailing parties, who make a proper application, and not to their attorneys." *Manning*, 510 F.3d at 1251.

Here, Ratliff successfully represented two social security claimants. Both clients owed outstanding debts to the United States government, and before paying the EAJA fees, the government offset the awards based on the claimants' outstanding debts pursuant to the Debt Collection Improvement Act ("DCIA"). 31 U.S.C. § 3716. Ratliff filed suit to obtain the attorney's fees awarded to her clients, and the district court determined that the government could offset the attorney's fees ob-

tained under the EAJA against each client's debt to the government. The DCIA subjects all federal payments, including fees, to administrative offset by the head of an executive, judicial or legislative agency. 31 C.F.R. § 285.5(e)(1). "[T]he primary purpose of the [DCIA] is to increase the collection of nontax debts owed to the Federal Government. . . ." Exec. Order No. 13,019, 61 Fed. Reg. 51,763 (Sept. 28, 1996). However, Congress recognized specific exceptions to the administrative offsets allowed under the DCIA. 31 U.S.C. § 3716(c)(3)(A). EAJA awards are not listed as exceptions to the administrative offset provision, and there is no indication that Congress intended to exclude EAJA awards from DCIA offsets. Thus, the failure of the DCIA to exempt EAJA awards from offset leads me to believe that Congress intended to allow EAJA awards to be offset against any debts the party owes to the government. *See Manning*, 510 F.3d at 1255.

Finally, the majority of other circuit courts to consider the issue disagree with our conclusion and hold that awards of attorney's fees belong to the client as the prevailing party, not to the attorney. *See Reeves*, 526 F.3d 732; *Manning*, 510 F.3d 1246; *FDL Techs., Inc.*, 967 F.2d 1578; *cf. King v. Comm'r*, 230 Fed. Appx. 476, 482 (6th Cir. 2007) (unpublished) (stating that "attorney's fee awards are necessarily payable to the attorney, either directly or through the hands of the prevailing party" while concluding that the motion for attorney's fees was actually brought on behalf of the attorney's client). *But see Marre*, 117 F.3d at 304. Accordingly, I concur because I am compelled to do so by *Curtis*, but I believe today's holding is in conflict with the repeated statements of the Supreme Court, the EAJA's plain language, and the decisions of several other circuit courts.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

Civ. No. 06-5070-RHB

CATHERINE G. RATLIFF, PLAINTIFF

v.

MICHAEL ASTRUE[1], COMMISSIONER
OF SOCIAL SECURITY, DEFENDANT

[Filed: May 10, 2007]

ORDER

NATURE AND PROCEDURE OF THE CASE

Plaintiff, Catherine Ratliff (Ratliff), an attorney, represented two different claimants in their efforts to receive benefits from the Social Security Administration. Upon successful judicial review in both actions, Ratliff, on behalf of her clients, moved for the award of fees and costs pursuant to the Equal Access to Justice Act (EAJA). *See Randall v. Barnhart*, CIV. 05-5080; *Kills Ree v. Barnhart*, CIV. 04-5119. The Court granted

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[1] Jo Anne B. Barnhart was the named party when the suit was commenced. Michael Astrue is the current Commissioner of Social Security and as such, has replaced Jo Anne B. Barnhart as a party in this action.

the request and awarded the fees and costs. Subsequently, Ratliff's clients were informed that the court-ordered EAJA award had been reduced due to debts they owed to the United States government. Ratliff then commenced this action alleging that the reduction, or offset, of the EAJA award was an illegal seizure prohibited by the Fourth Amendment. Defendant moves the Court to dismiss this action. Ratliff moves for summary judgment.

DISCUSSION

Defendant alleges that plaintiff does not have the requisite standing to bring this action. "To establish standing, a plaintiff is required to show that he or she had '"suffered an injury in fact, meaning that the injury is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical.' Second, the injury must be traceable to the defendant's challenged action. Third, it must be 'likely' rather than 'speculative' that a favorable decision will redress the injury." *Jones v. Gale*, 470 F.3d 1261, 1265 (8th Cir. 2006) (quoting *South Dakota Farm Bureau, Inc. v. Hazeltine*, 340 F.3d 583, 591 (8th Cir. 2003) (citations omitted)).

In the instant case, plaintiff has not suffered an injury in fact. Title 28 of the United States Code, Section 2412, also referred to as EAJA, allows the award of costs and fees to a prevailing party who has commenced an action where the United States is a party. It states in pertinent part,

> (A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses

> . . . incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.
>
> (B) A party seeking an award of fees and other expenses shall . . . submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an itemized statement from *any* attorney or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed.

28 U.S.C. § 2412(d)(1)(A) & (B) (emphasis added).

"'If statutory language is plain and unambiguous, the court must look only to the plain meaning of the statutory language.' . . . 'Words and phrases are to be given their ordinary meaning.'" *Marvin Lumber and Cedar Co. v. PPG Industries, Inc.*, 401 F.3d 901, 921 (8th Cir. 2005) (citations omitted). To receive an award under this statute, the party requesting the award must show that he is a "prevailing party" and submit the statement of "any" attorney that represented him. Reading the provisions of the statute together, it becomes apparent that it is the client, not the attorney that is the prevailing party. *See FDL Technologies, Inc. v. United States*, 967 F.2d 1578, 1580 (Fed. Cir. 1992). If it were not so, Congress would not have required "any" attorney's

statement to be submitted with the request for an award. As such, the EAJA fee was awarded to Ratliff's clients and not to her directly. Therefore, Ratliff cannot seek her fees from the United States; rather, she must seek the fees from her clients. Not having suffered an injury in fact, Ratliff does not have the requisite standing to pursue this action.

Even if Ratliff qualified as a prevailing party, the laws and regulations of the United States allow for an offset of EAJA fees. Title 31 of the United States Code, section 3716 allows for administrative offsets of federal payments.

> Except as otherwise provided in this subsection, a disbursing official of the Department of the Treasury, the Department of Defense, the United States Postal Service, or any other government corporation, or any disbursing official of the United States designated by the Secretary of the Treasury, shall offset at least annually the amount of a payment which a payment certifying agency has certified to the disbursing official for disbursement by an amount equal to the amount of a claim which a creditor agency has certified to the Secretary of the Treasury pursuant to this subsection.

31 U.S.C. § 3716(c)(1)(A).

31 C.F.R. § 285.5(e)(1), which was promulgated pursuant to 31 U.S.C. § 3716, discusses what types of payments are subject to an administrative offset and which are exempt. It states:

> (1) Payments eligible for offset. Except as set forth in paragraph (e)(2) of this section, all Federal

payments are eligible for offset under this section. Eligible payments include, but are not limited to, Federal wage, salary, and retirement payments, vendor and expense reimbursement payments, certain benefit payments, travel advances and reimbursements, grants, *fees*, refunds, judgments . . . , tax refunds, and other payments made by Federal agencies.

(2) Payments excluded from offset under this section. This section does not apply to the following payments:

(i) Black Lung Part C benefit payments, or Railroad Retirement tier 2 payments;

(ii) Payments made under the tariff laws of the United States;

(iii) Veterans Affairs benefit payments to the extent such payments are exempt from offset pursuant to 38 U.S.C. 5301;

(iv) Payments made under any program administered by the Secretary of Education under title IV of the Higher Education Act . . . ;

(v) Payments made under any other Federal law if offset is expressly prohibited by Federal statute;

(vi) Payments made under any program which the Secretary has granted an exemption in accordance with the provisions of

> 31 U.S.C. 3716(c)(3)(B) and paragraph (e)(7) of this section; and
>
> (vii) Federal loan payments other than travel advances.

31 C.F.R. § 285.5 (emphasis added). Under this regulation, fees, which would include attorney's fees, are expressly included as subject to administrative offsets. Such fees would only be exempt from offsets if expressly excluded by this regulation or within the EAJA statute.

In reviewing the relevant portion of the EAJA statute, the Court finds that an award pursuant to the statute is not exempt from administrative offsets. Title 42 of the United States Code, section 2412(d)(l)(A) states in pertinent part,

> (A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses . . . incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

As neither the regulation, nor the statute, expressly preclude the offset of attorney's fees, the offset in this matter was appropriate. Accordingly, it is hereby

ORDERED that defendant's motion to dismiss (Docket #8) is granted.

IT IS FURTHER ORDERED that plaintiff's motion for summary judgment (Docket #10) is denied.

Dated this 10th day of May, 2007.

BY THE COURT:

/s/ RICHARD H. BATTEY
RICHARD H. BATTEY
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 07-2317

CATHERINE G. RATLIFF, APPELLANT

v.

MICHAEL J. ASTRUE, COMMISSIONER
OF SOCIAL SECURITY, APPELLEE

Appeal from U.S. District Court
for the District of South Dakota
(5:06-cv-05070-RHB)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Chief Judge LOKEN, Judge RILEY, Judge COLLOTON, Judge GRUENDER and Judge BENTON would grant the petition for rehearing en banc.

December 05, 2008

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ MICHAEL E. GANS

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
WESTERN DISTRICT

Civ. No. 06-5070

CATHERINE G. RATLIFF, PLAINTIFF

v.

JO ANNE B. BARNHART, COMMISSIONER
OF SOCIAL SECURITY, DEFENDANT

[Filed: Sept. 11. 2006]

COMPLAINT

---

1. Plaintiff is an attorney who successfully represented two social security claimants, Michael B. Randall and Ruby Willow Kills Ree, in social security cases in this court. *Randall* is Civ. 05-5080; *Kills Ree* is Civ. 04-5119.

2. Defendant is Commissioner of Social Security and is sued in her official capacity.

3. Plaintiff was awarded attorney fees under the Equal Access to Justice Act in both cases.

4. In both cases, defendant unreasonably and unlawfully seized plaintiff's EAJA fee, without due pro-

cess, to satisfy debts allegedly owed by the client to the government.

5. In *Randall*, defendant unreasonably and unlawfully seized $866.02; in *Kills Ree*, defendant unreasonably and unlawfully seized $2,239.35.

Jurisdiction

6. This is an action to redress deprivation of plaintiff's right to due process of law as guaranteed by the Fifth Amendment to the United States Constitution, and plaintiff's right to be free from unreasonable seizures as guaranteed by the Fourth Amendment to the United States Constitution. This court has jurisdiction under 28 U.S.C. § 1331, the Administrative Procedures Act, and 28 U.S.C. § 1361 (mandamus).

Cause of Action

7. Defendant is not entitled to seize plaintiff's EAJA fees to satisfy debts that plaintiff's clients allegedly owe defendant.

8. Defendant seized plaintiff's fees unreasonably, in violation of the Fourth Amendment.

9. Defendant seized plaintiff's fees without due process of law, in violation of the Fifth Amendment.

10. Defendant's position is not substantially justified within the meaning of the Equal Access to Justice Act.

WHEREFORE plaintiff requests relief as follows:

1. An order compelling defendant to disgorge to plaintiff her fees it unlawfully seized.

2. Reasonable attorney's fees and costs of this action; and

3. Such other and further relief as the Court deems just.

Dated: September 8, 2006

Respectfully submitted,

/s/ JAMES D. LEACH

JAMES D. LEACH
Attorney at Law
1617 Sheridan Lake Rd.
Rapid City, SD 57702
Tel 605 341 4400
Attorney for Plaintiff

APPENDIX E

DEPARTMENT OF THE TREASURY
FINANCIAL MANAGEMENT SERVICE
P.O. BOX 1686
BIRMINGHAM, ALABAMA 35201-1686

THIS IS NOT A BILL – PLEASE RETAIN FOR YOUR RECORDS

01/31/06

RUBY WILLOW
C/O CATHERINE RATLIFF
PO BOX 844
HOT SPRINGS, SD 47747

Dear RUBY WILLOW:

As authorized by Federal law, we applied all or part of your Federal payment to a debt you owe. The government agency (or agencies) collecting your debt is listed below.

DFS PRICE UNIT
FEDERAL OFFSET PROGRAM
PO BOX 967
CHEYENNE WY 82002
800-264-1293 1-800-264-1293
PURPOSE: Non-Tax Federal Debt

TIN Num: [REDACTED]
TOP Trace Num: P30022477
Acct Num: 00016544FS00000001
Amount This Creditor: $2239.35
Creditor: 28 Site: WY

The Agency has previously sent notice to you at the last address known to the Agency. That notice explained the amount and type of debt you owe, the rights available to you, and that the Agency intended to collect the debt by intercepting any Federal payments made to you, including tax refunds. **If you believe your payment was reduced in error or if you have questions about this debt, you must contact the Agency at the address and telephone number shown above.** The U.S. Department of the Treasury's Financial Management Service cannot resolve issues regarding debts with other agencies.

We will forward the money taken from your Federal payment to the Agency to be applied to your debt balance: however, the Agency may not receive the funds for several weeks after the payment date. If you intend to contact the Agency, please have this notice available.

/s/ JEFFREY SCHRAMEK
JEFFREY SCHRAMEK
Department of the Treasury, Financial Management Service
(800) 304-3107
Telecommunications Device for the Deaf (TDD)
(866) 297-0517

PAYMENT SUMMARY
PAYEE NAME: RUBY WILLOW
PAYMENT BEFORE REDUCTION: $2239.35
TOTAL AMOUNT OF THIS REDUCTION: $2239.35
PAYING FEDERAL AGENCY: Social Security Administration

PAYMENT DATE: 01/31/06
PAYMENT TYPE: Check

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

Civ. No. 04-5119

RUBY WILLOW KILLS REE, PLAINTIFF

v.

JO ANNE B. BARNHART, COMMISSIONER
OF SOCIAL SECURITY, DEFENDANT

[Filed Jan. 17, 2006]

ORDER

Pending before the Court is Plaintiff's Motion for EAJA Fee [doc. #22]. The Defendant, by her attorney, the United States Attorney for the District of South Dakota, has notified the Court of her intent not oppose the Plaintiff's Motion. Accordingly it is hereby

ORDERED that the Defendant shall pay Plaintiff's claim for EAJA fees in the amount of $2,112.60 in attorney fees under the Equal Access to Justice Act, 28 U.S.C. § 2412; and the amount of $126.75 in sales tax as an "other expense" under 28 U.S.C. § 2412(d)(1)(A). Judgment shall be entered in favor of the Plaintiff and against the Defendant accordingly.

Dated this 17th day of January, 2006.

BY THE COURT:

/s/ ANDREW W. BOGUE
ANDREW W. BOGUE
Senior District Judge

APPENDIX G

1. 28 U.S.C. 2412 provides in pertinent part:

Costs and fees

(a)(1) Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title, but not including the fees and expenses of attorneys, may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. A judgment for costs when taxed against the United States shall, in an amount established by statute, court rule, or order, be limited to reimbursing in whole or in part the prevailing party for the costs incurred by such party in the litigation.

* * * * *

(b) Unless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys, in addition to the costs which may be awarded pursuant to subsection (a), to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award.

* * * * *

(d)(1)(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

(B) A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an itemized statement from any attorney or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed. The party shall also allege that the position of the United States was not substantially justified. Whether or not the position of the United States was substantially justified shall be determined on the basis of the record (including the record with respect to the action or failure to act by the agency upon which the civil action is based) which is made in the civil action for which fees and other expenses are sought.

* * * * *

(2) For the purposes of this subsection—

(A) "fees and other expenses" includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the court to be necessary for the preparation of the party's case, and reasonable attorney fees (The amount of fees awarded under this subsection shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the United States; and (ii) attorney fees shall not be awarded in excess of $125 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.);

(B) "party" means (i) an individual whose net worth did not exceed $2,000,000 at the time the civil action was filed, or (ii) any owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization, the net worth of which did not exceed $7,000,000 at the time the civil action was filed, and which had not more than 500 employees at the time the civil action was filed; except that an organization described in section 501(c)(3) of the Internal Revenue Code of 1986 (26 U.S.C. 501(c)(3)) exempt from taxation under section 501(a) of such Code, or a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)), may be a party regardless of the net worth of such organiza-

tion or cooperative association or for purposes of subsection (d)(1)(D), a small entity as defined in section 601 of title 5;

* * * * *

(H) "prevailing party", in the case of eminent domain proceedings, means a party who obtains a final judgment (other than by settlement), exclusive of interest, the amount of which is at least as close to the highest valuation of the property involved that is attested to at trial on behalf of the property owner as it is to the highest valuation of the property involved that is attested to at trial on behalf of the Government; and

* * * * *

2. 42 U.S.C. 406 provides in pertinent part:

Representation of claimants before Commissioner

* * * * *

(b) Fees for representation before court

(1)(A) Whenever a court renders a judgment favorable to a claimant under this subchapter who was represented before the court by an attorney, the court may determine and allow as part of its judgment a reasonable fee for such representation, not in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment, and the Commissioner of Social Security may, notwithstanding the provisions of section 405(i) of this title, but subject to subsection (d) of this section, certify the amount of such

fee for payment to such attorney out of, and not in addition to, the amount of such past-due benefits. In case of any such judgment, no other fee may be payable or certified for payment for such representation except as provided in this paragraph.

* * * * *

3. 42 U.S.C. 1988 provides in pertinent part:

Proceedings in vindication of civil rights

* * * * *

(b) Attorney's fees

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92–318 [20 U.S.C. 1681 et seq.], the Religious Freedom Restoration Act of 1993 [42 U.S.C. 2000bb et seq.], the Religious Land Use and Institutionalized Persons Act of 2000 [42 U.S.C. 2000cc et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.], or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

* * * * *

OPPOSITION BRIEF

Supreme Court, U.S.
FILED
JUN 25 2009
OFFICE OF THE CLERK

No. 08-1322

IN THE

Supreme Court of the United States

MICHAEL J. ASTRUE,
COMMISSIONER OF SOCIAL SECURITY,

Petitioner,

v.

CATHERINE G. RATLIFF,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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Attorneys for Respondent

June 2009

QUESTION PRESENTED

Whether an attorney fee awarded under the Equal Access to Justice Act in an *in forma pauperis* Social Security case is invariably and as a matter of law property of the plaintiff subject to offset based on the plaintiff's debts to the federal government, without regard to any property rights of the attorney in the fee.

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INTRODUCTION

This case was a dispute over whether respondent Catherine Ratliff, an attorney who successfully represented a Social Security claimant in an earlier *in forma pauperis* action seeking review of the Social Security Administration's wrongful denial of benefits, should be permitted to recover fees and expenses amounting to $2,239.35, which were awarded under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d), for her work in the prior action. The Solicitor General has asked this Court to review the case to decide whether EAJA fees in Social Security cases are properly paid to attorneys or instead belong to their clients and are thus subject to offsets for unrelated debts owed by the clients to the government.

This case is an especially poor vehicle for resolving the question. At best, it is unclear whether this is still a live case. The Eighth Circuit held that Ms. Ratliff had Article III standing to bring a stand-alone action asserting constitutional claims for the recovery of EAJA fees that the government had offset on account of a debt owed by her client and that the offset violated the Fourth Amendment, and it remanded the case for further proceedings. After the court of appeals denied rehearing, the government did not seek a stay of the mandate or otherwise attempt to forestall further action in the district court, and the district court entered final judgment in Ms. Ratliff's favor on January 15, 2009. The government did not appeal that final judgment, and its time for appealing expired six weeks before it filed its petition for certiorari. Thus, the government now seeks review of an interlocutory ruling in a case that has been finally terminated. Absent an ongoing case in

which it could be applied, a decision on the question presented would be an advisory opinion.

Even leaving aside the unappealed final judgment, this case presents the issue in a very unusual posture. Other cases that have addressed the issue have done so in the same action in which the EAJA fees were awarded and have considered whether the judgment should require that fees be paid directly to the attorney to avoid the possibility of offset. This case is the only one in which the issue has arisen as a result of a separate action raising constitutional claims on behalf of the attorney, and the court of appeals' decision addresses the issue primarily as a threshold matter of the attorney's Article III standing. The unusual procedural setting, which presents a number of issues that are potentially different from those that have arisen in other cases on which the Solicitor General relies, together with the Eighth Circuit's focus on standing, make this unique case a poor choice for resolving the issue presented in the petition.

In any event, only a few months ago, the Solicitor General informed the Court that the developing split of authority over the EAJA offset issue was not yet important enough to warrant this Court's review until more circuits had established their position on the question. *See* Brief for the Respondent in Opposition, *Reeves v. Astrue*, No. 08-5605 (filed Nov. 5, 2008); *see also* Brief for the Respondent in Opposition, *Manning v. Astrue*, No. 07-1468 (filed Sept. 26, 2008). Consistent with this advice, this Court not only denied both petitions, but did so in *Reeves* even after being advised that the Eighth Circuit had denied the government's petition for rehearing in this case.

Manning v. Astrue, 129 S. Ct. 486 (2008); *Reeves v. Astrue*, 129 S.Ct. 724 (2008); *see* Pet. 15 n.5.

Review by this Court remains premature. Although other circuits continue to weigh in on the issue, many have not yet spoken, and appeals are pending in at least the Second, Sixth, and Ninth Circuits. The outcomes of those cases are likely to determine whether a significant conflict will develop over the issue, in which event review by this Court may be called for. If one or more of those circuits rules against the government's position, the government will have ample additional opportunities to seek review by this Court. If, on the other hand, the decision below is ultimately the only one that sustains an attorney's entitlement to receive EAJA fees in a Social Security case (an unlikely prospect given the merits of the issue), it is probable that the Circuit's own en banc review process will ultimately address the matter.

Finally, the decision below is correct. Contrary to the government's contention, the plain language of the statute does not address the dispositive issue, which is not who, formally, is the party entitled to move for an award of fees, but who is the real party in interest that should receive payment once the fees are awarded. The government's position fails to account for statutory language directly applicable to Social Security cases, which provides that in such cases EAJA fees are received by *attorneys*. Moreover, the government's argument ignores that in an *in forma pauperis* case such as this one, EAJA fees are not recompense for fees paid by the client, but are intended to and do provide attorneys with compensation that they will not otherwise receive. Indeed, in

many Social Security cases, attorneys are forbidden by law to collect any fee directly from their clients. The government's position threatens dire consequences for Social Security claimants, who have difficulty enough obtaining good legal representation for the very modest amounts of fees available under EAJA (or, where applicable, the Social Security Act's own 25% fee provision) and will find it even more difficult to obtain assistance if they owe even small amounts of money to the government for reasons having nothing to with their Social Security cases.

STATEMENT OF THE CASE

1. The Government's EAJA Offset Policy

This case has its origin in the federal government's very recent policy of attempting to recoup debts owed to it by offsetting them against attorney fee awards under EAJA, under the purported authority of the Debt Collection Improvement Act of 1996, Pub. L. No. 104-134, Tit. III, ch. 10, § 31001, 110 Stat. 1321-358, and the government's claimed "common law" right to offset. *See* Pet. 4 & n.1. Although the Debt Collection Improvement Act was enacted in 1996 and the asserted common-law right has presumably existed at all times (assuming it exists at all), the government did not begin implementing its policy of attempting to invoke offsets against EAJA fee awards until 2005, a quarter century after EAJA's enactment. *See* Pet. 4. At that time, apparently as a result of improved systems for matching the identities of payees and debtors, the government changed its longstanding policy of making checks for EAJA awards payable to the attorneys for whose work fees had been awarded. It began instead to treat clients who owe the government money as the

payees, enabling it to offset the EAJA payments to collect its asserted debts.

2. The *Kills Ree* Case and the EAJA Award

The events giving rise to this particular controversy over the application of the government's new policy began in December 2004, when Catherine Ratliff, a Hot Springs, South Dakota attorney and the respondent here, filed a Social Security benefits case in the United States District Court for the District of South Dakota on behalf of her client, Ruby Willow Kills Ree. Ms. Kills Ree, a Lakota Indian living on the Pine Ridge Reservation, had made repeated unsuccessful efforts to obtain Supplemental Security Income (SSI) benefits on account of multiple disabilities.[1] In 2003, after a remand in an earlier court proceeding, an administrative law judge ruled that Ms. Kills Ree was eligible for benefits because she suffered from disabilities including diabetes, arthritis, reactive airway disease, adjustment disorder with depressed mood, and borderline intellectual functioning. Nonetheless, the ALJ unaccountably failed to order that she be awarded benefits for the full period beginning on the date she filed the application for benefits that was ultimately granted. The Social Security Administration's Appeals Council declined to hear her appeal on this and other issues, and she was forced to obtain Ms. Ratliff's assistance to file

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[1] The SSI program, created by Title XVI of the Social Security Act, 42 U.S.C. subchapter XVI, is "designed to help aged, blind, and disabled people, who have little or no income" by "provid[ing] cash to meet basic needs for food, clothing, and shelter." Social Security Administration, Supplemental Security Income Home Page, http://www.ssa.gov/ssi/index.htm.

suit in federal court to seek the full benefits to which she was entitled.

Before her complaint was served, Ms. Kills Ree applied for and was granted *in forma pauperis* status under 28 U.S.C. § 1915, which required the district court to determine, based upon an affidavit listing all of Ms. Kills Ree's assets, that she was financially unable to pay filing fees and other costs of maintaining the suit. *See id.* § 1915(a)(1). Once the complaint was served, the government did not defend the ALJ's refusal to award all benefits due her from the date of her application. In September 2005, the district court remanded Ms. Kills Ree's benefits claim to the agency. In January 2006, the court granted an unopposed motion for attorney fees under EAJA in the amount of $2,112.60 for Ms. Ratliff's work, as well as expenses in the amount of $126.75 (reflecting the amount of South Dakota sales tax required to be paid on the fee award).

Rather than paying the fees, the Treasury Department sent Ms. Kills Ree a notice stating that it had "applied all or part of your Federal payment to a debt you owe." The notice went on to recite that the amount of the payment before reduction to offset the debt was $2,239.35 and that the amount of the reduction was $2,239.35, leaving nothing to pay Ms. Ratliff for the services she had rendered. Because her client was, as the district court had determined, indigent, the effect of the government's offset was to deprive Ms. Ratliff of any possibility of payment for her successful work on behalf of Ms. Kills Ree.

3. Ms. Ratliff's Lawsuit

In September 2006, Ms. Ratliff filed this action seeking to recover the attorney fees and expenses

awarded in the *Kills Ree* case.[2] Ms. Ratliff's complaint named only the then-Commissioner of Social Security, Jo Anne Barnhart, as defendant, and it alleged jurisdiction under 28 U.S.C. § 1331. The complaint also invoked the Administrative Procedure Act, and it claimed that the offset of the EAJA awards unconstitutionally deprived Ms. Ratliff of property without due process of law and was an unreasonable seizure of property in violation of the Fourth Amendment; more generally, it averred that "[d]efendant is not entitled to seize plaintiff's EAJA fees to satisfy debts that plaintiff's clients allegedly owe defendant." Pet. App. 19a. Based on these claims, the complaint sought monetary relief (referred to in the complaint as disgorgement) in the amount of the EAJA fees offset by the government.

The government seemingly treated the claim as one against the Social Security Administration. Foregoing defenses that it would usually be expected to invoke against such claims (such as challenges to jurisdiction, the existence of rights of action in these circumstances under the constitutional provisions cited, sovereign immunity, etc.), the government filed a motion for summary judgment addressing the merits of the question whether EAJA fee awards are the

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[2] Ms. Ratliff's suit also sought to recover $866.02 that the government had deducted from a $6,160.37 award of fees and costs in another Social Security case she had brought on behalf of Michael Randall. The petition for certiorari, however, represents that the government now agrees that the fee award in the *Randall* case was not properly subject to offset for reasons unrelated to the issue in this case, and the government thus no longer contests Ms. Ratliff's entitlement to receive this amount. *See* Pet. 5 n.2.

property of and payable to the prevailing party or her attorney. The government argued that such fees belong exclusively to the party and thus are subject to offset for debts the party owes to the federal government. The government further argued that Ms. Ratliff did not even have Article III standing to assert her claims because the EAJA fees were not her property and therefore she had suffered no "injury in fact" when the government took an action that deprived her of any possibility of payment for her work.

Ms. Ratliff cross-moved for summary judgment. In opposing her motion, the government restated its merits and standing arguments and offered one further defense: It invoked 31 U.S.C. § 3716(c)(2), which provides that in cases of administrative offset, "[n]either the disbursing official nor the payment certifying agency shall be liable—(A) for the amount of the administrative offset on the basis that the underlying obligation, represented by the payment before the administrative offset was taken, was not satisfied ...." Because the Social Security Administration was the "payment certifying agency," the government argued, this provision shielded the defendant (the head of that agency) from any liability for failure to satisfy the obligation against which the offset was taken.

4. The District Court's Decision

On May 10, 2007, the district court issued its decision dismissing Ms. Ratliff's lawsuit for lack of standing. According to the court, the "plain meaning" of EAJA was that the client, rather than the attorney was the "prevailing party" and thus "the EAJA fee was awarded to Ratliff's clients and not to her directly." Pet. App. 12a-13a. Ignoring that it had previ-

ously found in granting *in forma pauperis* status that Ms. Kilis Ree could not even afford to pay the fee to file her complaint and thus obviously lacked resources to pay her attorney, the district court held: "Ratliff cannot seek her fees from the United States; rather, she must seek the fees from her clients. Not having suffered an injury in fact, Ratliff does not have the requisite standing to pursue this action." Pet. App. 13a.

5. The Eighth Circuit's Decision

Ms. Ratliff appealed, and, on September 5, 2008, the Eighth Circuit reversed. In a short opinion, the panel concluded that "controlling Eighth Circuit precedent" (Pet. App. 2a)—principally *Curtis v. City of Des Moines*, 995 F.2d 125 (8th Cir. 1993)—compelled the conclusion that EAJA fee awards become the property of the prevailing parties' attorneys once they are assessed. Based on this conclusion, the court found "that Ratliff has standing to bring an independent action to collect the fees and that the government's withholding of the fee awards to cover the claimants' debts was in violation of the Fourth Amendment." The court had no occasion to discuss the government's purported defense under 31 U.S.C. § 3716(c)(2), which the district court had not addressed in view of its disposition of the case.

The government sought rehearing en banc, urging the same conflict among the circuits that it relies on in its petition for certiorari, and noting that two of the judges on the panel had expressed doubts about, and the third outright disagreement with, the Eighth Circuit precedent that all three agreed compelled the result. On December 5, 2008, the court denied rehearing en banc.

6. The *Manning* and *Reeves* Petitions

Meanwhile, petitions for certiorari had been filed seeking review of two other recent appellate decisions considering whether EAJA fees in Social Security cases are subject to offset based on debts owed to the government by the prevailing Social Security claimants: *Manning v. Astrue*, 510 F.3d 1246 (10th Cir. 2007), and *Reeves v. Astrue*, 526 F.3d 732 (11th Cir. 2008), both of which rejected arguments that district courts should order payment of EAJA fees directly to attorneys to avoid offsets. In the briefs in opposition in both *Manning* (No. 07-1468) and *Reeves* (No. 08-5605), the Solicitor General argued that the decisions conflicted with the Eighth Circuit's decision in this case but that review by this Court was "premature" because the conflicts alleged by the petitioners were "exaggerated" and a "consensus" might yet develop among the courts of appeals, particularly if the Eighth Circuit were to grant rehearing en banc in this case. Brief for the Respondent in Opposition, *Manning*, at 6, 11, 15; Brief for the Respondent in Opposition, *Reeves*, 8, 15, 19.

This Court denied certiorari in *Manning* on November 3, 2008. 129 S. Ct. 486. On December 5, 2008, the Solicitor General advised this Court in the *Reeves* case that the Eighth Circuit had denied the government's rehearing petition in this case. The Court nonetheless denied certiorari in *Reeves* on December 8, 2008. 129 S. Ct. 724.

7. The Unappealed Final Judgment

The Eighth Circuit issued its mandate in due course on December 12, 2008, one week after its denial of rehearing. The government did not seek to stay the mandate or otherwise defer proceedings in

the district court pending further review. And although the Eighth Circuit had held only that Ms. Ratliff had standing and that a Fourth Amendment violation had occurred, the government made no further attempt to invoke the Social Security Administration's previously asserted defense to liability under 31 U.S.C. § 3716(c)(2). Nor did the government assert any other potential defenses to the monetary remedy Ms. Ratliff sought.

Accordingly, on January 15, 2009, without objection by the government, the district court entered judgment in Ms. Ratliff's favor in the amount of $3,105.57.[3] That judgment, which is reproduced in the appendix to this brief, was in all respects final and was set forth in a separate document as required by Federal Rule of Civil Procedure 58. The government filed no post-judgment motions under Federal Rules of Civil Procedure 59 or 60, nor did it appeal. The time for appeal from the district court's final judgment expired on March 16, 2009.

After two extensions of time, the government filed its petition for certiorari seeking review of the Eighth Circuit's decision on April 28, 2009—42 days after the expiration of its time to appeal the judgment that finally terminated this case.

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[3] The amount of the judgment includes Ms. Ratliff's requested recovery of the *Kills Ree* EAJA award ($2,239.35) and the withheld portion of the *Randall* EAJA award ($866.02), which the government no longer contests.

REASONS FOR DENYING THE WRIT

I. This Case Is Not a Suitable One in Which to Resolve the Question Presented.

A. The Case Has Ended in an Unappealed Final Judgment.

Under ordinary circumstances, an appealable final judgment moots an interlocutory appeal because the issues in the interlocutory appeal merge in the final judgment. *See, e.g., Harper v. Poway Unified School Dist.*, 549 U.S. 1262 (2007). The Eighth Circuit's decision here was interlocutory, not final: It held that Ms. Ratliff had standing to sue because she had a property interest in the EAJA fee and that, as a matter of law, the government's seizure of the fee violated the Fourth Amendment, and it remanded for further proceedings. It neither explicitly addressed nor implicitly foreclosed the defense that the government had asserted under 31 U.S.C. § 3716(c)(2), nor did it foreclose other defenses that the government might have chosen to raise. And it did not direct the district court to award Ms. Ratliff a sum certain. Nonetheless, the government on remand did not object to the entry of a final judgment against it, and it did not appeal that judgment.

The government's petition for certiorari thus comes before the Court in an unusual posture: It is an attempt to obtain review of an interlocutory ruling in a case that has terminated in an unappealed final judgment. The district court's final judgment marked the end of the case. *See Catlin v. United States*, 324 U.S. 229, 233 (1945) (final judgment "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment"). Ordi-

narily, interlocutory appellate rulings merge into a final judgment and are reviewable by this Court after appeal from the final judgment (even though the court of appeals in such cases may be bound by its prior rulings under the doctrine of law of the case). *See, e.g.*, *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 257-59 (1916); *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363, 365-66 n.1 (1973). Absent special circumstances, an interlocutory ruling that is issued as a way station to an *unappealed* final judgment no longer presents a live issue, as the case at that point is over. *Cf. Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 315 (1999) ("Generally, an appeal from the grant of a preliminary injunction becomes moot when the trial court enters a permanent injunction, because the former merges into the latter.")[4]; *Harper*, 549 U.S. at 1262 (holding interlocutory appeal was "moot" following entry of final judgment against the appellant).

Here, the government made no effort to prevent the case from becoming final on remand to the district court. It neither sought to stay the Eighth Circuit's mandate nor to forestall further action by the district court; it simply abandoned any and all remaining defenses and let the case end in Ms. Ratliff's favor. There is no remaining case between the par-

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[4] In *Grupo Mexicano*, the Court found that the interlocutory appeal was not mooted by the unappealed final judgment, because the appeal still had consequences for the parties that were independent of the district court's ultimate disposition of the case on the merits—namely, possible recovery on the preliminary injunction bond. *See* 527 U.S. at 313-18. No such ongoing collateral consequences are present here.

ties in which this Court may review the Eighth Circuit's interlocutory ruling.

Of course, where a court of appeals issues a *final* ruling in a case and its mandate issues, resulting in a ministerial entry of judgment in the district court, this Court has the power to review the final decision of the court of appeals without a new appeal from the final judgment. In such a case, neither the court of appeals' issuance of its mandate nor the subsequent action of the district court defeats this Court's jurisdiction. *See Carr v. Zaja*, 283 U.S. 52 (1931).

But where the court of appeals' decision is, as in this case, not final and leaves open the possibility of further proceedings in which either party might prevail, the matter is quite different. To begin with, it is the general policy of this Court not to exercise its certiorari jurisdiction in such cases, but to await a final disposition in the district court and an ensuing appeal, in part because of the possibility that the case might be resolved below on other grounds that would avoid the claimed need for this Court's intervention. *See Virginia Military Inst. v. United States*, 508 U.S. 946 (1993) (opinion of Scalia, J., respecting the denial of certiorari). To permit a litigant that has bypassed the possibility of prevailing on an alternative ground on remand, and has not even appealed the resulting adverse judgment against it, to obtain certiorari review of the interlocutory appellate decision would, at a minimum, undermine that policy. Moreover, because of the doctrine that interlocutory rulings merge in a final judgment, the unappealed final judgment, by definitively terminating the litigation between the parties, would appear to deprive

this Court of jurisdiction because there is no longer any live case or controversy between the parties.[5]

Regardless of whether the government's failure to appeal the final judgment on remand is a jurisdictional bar to the Court's consideration of the petition, this highly unusual circumstance is, at least, a powerful reason for this Court not to exercise its certiorari jurisdiction and reward a party that has both abandoned alternative lines of defense and failed to challenge in any way the district court's ultimate entry of final judgment against it.

B. The Case's Unique Procedural Characteristics Make It a Poor Choice for Review.

Among opinions of the lower federal courts addressing the question of an attorney's entitlement to receive an EAJA award in a Social Security case, the decision below is the only one to be issued in an independent action for damages against the government brought by the attorney. In other cases, both past and pending, the issue has been litigated in the underlying case in which fees were awarded and has generally arisen from a motion that the check for the fees be made payable to the attorney rather than the

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[5] It is unclear what action the Eighth Circuit could take if, at this point, this Court were to remand to that Court for further proceedings consistent with this Court's opinion, because the case in the Eighth Circuit was an appeal from an order in a case that no longer exists. No relief would appear to be available to the government at this point, as a final remedy—payment of the fee by the government to Ms. Ratliff—has already been awarded and is no longer subject to review. *See* App 1a.

client. Even leaving aside the matter of the unappealed final judgment against the government, this significant procedural difference provides a strong reason why this case would not be the right one in which to address the issue even should the Court be inclined to do so.

In particular, none of the other decisions cited by the government decides whether an attorney may bring a separate action against the government to recover fees that were awarded for her efforts but that the government has offset to repay a debt owed it by the client. Indeed, one of the government's favored decisions, the Tenth Circuit's opinion in *Manning v. Astrue*, acknowledges the argument that an attorney may have a property interest (in the nature of a lien) in an EAJA fee, and expressly declines to decide whether any such property interest exists or takes priority over the government's offset right, or how the attorney may assert such an interest. *See* 510 F.3d at 1249. Thus, *Manning* explicitly leaves open the possibility that an attorney might bring an action, such as this one, to assert her own property rights. *Reeves*, the other appellate decision on which the government principally relies, does not mention the possibility of an action by the attorney at all, nor does the Fourth Circuit's recent decision in *Stephens v. Astrue*, 565 F.3d 131 (4th Cir. 2009).[6]

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[6] The other court of appeals opinion principally relied on by the government, *Panola Land Buying Ass'n v. Clark*, 844 F.2d 1506 (11th Cir. 1988), did not involve fees in a Social Security case. As the government itself has acknowledged (and as explained further below), "[f]ee relationships in Social-Security-benefit cases are different than in other EAJA contexts because

(*Footnote continued*)

Moreover, an action such as this one raises a host of issues not present where the question whether an EAJA fee is payable in the first instance to the attorney or the client is raised in the action in which the fee has been awarded. Those questions, none of which was explored in the courts below (principally because of the government's failure to raise them), include the jurisdictional basis of the suit;[7] the existence and nature of the cause of action; the proper defendant (*i.e.*, the United States, the agency to whom the client's debt was owed, or, as here, the official or agency that was the defendant in the action where the EAJA fee was awarded); and the possibility of sovereign or official immunity (depending on who was the proper defendant). Also potentially implicated in a lawsuit of this kind is 31 U.S.C. § 3716(c)(2), which appears to provide a defense to liability in certain circumstances to the "disbursing official" and the "payment certifying agency." Although the government at one point raised that defense, its scope and possible application were never decided by the lower courts because of the govern-

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of statutory provisions prohibiting attorneys from collecting or demanding from their clients anything more than the authorized allocation of past-due benefits awarded by a court." *Manning* Br. in Opp. 9, n.2. Moreover, *Panola* involved the distinct question whether an attorney can intervene in an action to apply for a fee waived by the client, not whether the attorney has an interest in the fee once awarded.

[7] The principal jurisdictional question would be whether the district court had jurisdiction under 28 U.S.C. § 1331, the basis claimed in the complaint, or whether Tucker Act jurisdiction would have to be invoked, and whether its requisites were satisfied, which would in turn depend on the nature of the right of action, if any. *See* 28 U.S.C. § 1346.

ment's failure to press the issue on remand. Finally, the Eighth Circuit's focus on standing and its reliance on the Fourth Amendment differentiate this case from others in which the EAJA offset issue has arisen and present other complicating factors not present in those cases.

In short, this case is unique among those posing the EAJA offset question. Even if the Court were inclined to address that issue, a more representative case would provide a better setting in which to resolve it.

II. Review of the Issue Is Best Deferred Pending Further Development of the Law in the Courts of Appeals.

This Court has only recently taken the Solicitor General's advice to *decline* review of the question presented as premature despite the exact conflict discussed in the government's petition in this case. In both *Reeves* and *Manning*, the government specifically informed the court of the Eighth Circuit's decision in this case but argued that the conflict between those decisions and this one did not then merit review. Similarly, the government advised in *Reeves* and *Manning* that the Fifth Circuit's decision on a similar issue in *Marré v. United States*, 117 F.3d 297 (5th Cir. 1997), which its current petition for certiorari describes as conflicting in principle with the decision below, was not in such direct conflict as to justify a grant of certiorari. This Court denied certiorari in both cases, and in *Reeves* it did so even *after* being advised by the government of the Eighth Circuit's denial of rehearing en banc in this case.

The only change in the landscape of appellate decisions since the Court's denial of certiorari in *Reeves* (and, indeed, since the filing of the petition for certiorari in this case) has been the Fourth Circuit's decision in *Stephens v. Astrue*, 565 F.3d 131, which adopts the government's view of the issue. Meanwhile, however, appeals raising the question are pending in at least three other circuits—the Second, Sixth, and Ninth.[8] Two of those cases (in the Second and Ninth Circuits) are appeals by the government from strong district court opinions in favor of the right of attorneys to receive EAJA fee awards in Social Security cases, and one (in the Sixth Circuit) is in a court that previously ruled in favor of an attorney on the issue in an unpublished opinion.[9]

The Court would benefit from the views of those courts before deciding whether it needs to address this issue. Strong opinions from those courts sustaining an attorney's right to receive EAJA fees in Social Security cases free from the government's offsets to recover debts owed by the clients could yet lead to an appellate consensus in favor of that view and would at a minimum provide the Court the benefit of a more thoughtful discussion of the issue (in contrast to the Eighth Circuit's mere reliance on prior circuit precedents) should it choose to review the question.

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[8] *Thompson v. Astrue*, 2009 WL 537512 (W.D.N.Y. Mar. 3, 2009), *notice of appeal filed* (Apr. 21, 2009); *Bryant v. Astrue*, 2008 WL 4186892 (E.D. Ky. Sept. 10, 2008), *appeal pending*, No. 08-6375 (6th Cir.); *McMahon v. Astrue*, 2008 WL 4183018 (D. Ariz. Sept. 8, 2008), *appeal pending*, No. 09-15873 (9th Cir.).

[9] *See King v. Commissioner of Soc. Sec.*, 230 Fed. Appx. 476, 481 (6th Cir. 2007).

Moreover, the Court would have a further opportunity to consider the issue should one of the circuits in which appeals are pending decide for the attorney, because the government could petition for certiorari from any such ruling.

In the less likely event that all the pending appeals are resolved in favor of the government, the Eighth Circuit would be left in isolation and, particularly given the doubts expressed by a number of its judges about the issue, might well resolve the conflict itself through the en banc process. Alternatively, if the court stuck to its guns, the government would have other opportunities to seek review by this Court given the government's recent national policy decision to collect debt by offsetting EAJA awards.

Nor would allowing the issue to develop further in the courts of appeals have significant adverse consequences for the government. The government already advised the Court, in its briefs in opposition in *Reeves* and *Manning* that its (self-imposed) inability to offset EAJA fees in the Fifth Circuit in light of the *Marré* decision was not so serious a problem for the government as to justify review of the question. *See Manning* Brief in Opp. 14-15. The government's inability to offset EAJA awards in Social Security cases in the much less populous Eighth Circuit should pose even less of a concern, particularly given that the government will have ample opportunities to seek review by this Court should disagreement among the circuits grow.[10]

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[10] The government does not argue that its ability to offset the small fee awards typical in Social Security EAJA cases to recover debts owed by usually impecunious Social Security

(*Footnote continued*)

III. The Decision Below Is Correct.

Finally, the Eighth Circuit was correct in holding that attorneys are entitled to receive EAJA awards in Social Security cases notwithstanding the government's purported offset rights to collect debts owed by the clients. The government's contrary argument is based on a misreading of the statutory language and would turn the purpose of fee awards in such cases on its head.[11]

To begin with, the government's facile contention that the plain language of EAJA resolves the issue is wrong. The government relies on 28 U.S.C. § 2412(d)(2)(A), which provides for the "award" of attorneys' fees "to a prevailing party." But although there is universal agreement that under the statute, only a "party" may seek an award of fees by submitting a fee application to the court (*see id.* § 2412(d)(2)), the statutory language does not specifically address whose *property* the fees become once awarded, or to whom the fees thus awarded *are payable*. As the district court observed in *Thompson v. Astrue* (the case currently on appeal to the Second Circuit), there is an "absence of explicit language in the EAJA directing the method by which the Commissioner should pay attorney fees to [the prevailing

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claimants is particularly significant as a fiscal matter. The only "practical" concern it identifies to justify a grant of certiorari is its desire to avoid what it calls "satellite litigation" over the proper payee. Pet. 16.

[11] The arguments opposing the government's position on the merits are more fully set forth in the district court opinions in *Thompson v. Astrue*, 2009 WL 537512, and *Quade v. Barnhart*, 570 F. Supp. 2d 1164 (D. Ariz. 2008).

party]." 2009 WL 537512, at *5; *see also King v. Commissioner*, 230 Fed.Appx. at 481-82 (noting that EAJA's language prevents an attorney from *applying* for fees, but that fees nonetheless are *payable* to the attorney).

The Eighth Circuit's recognition that an attorney has a protectible property interest in an EAJA fee once it is awarded finds strong support in the long-established rule that an attorney's interest in a fee for her efforts creates a lien allowing equitable tracing of funds that have been transferred to other creditors of the client. *See Barnes v. Alexander*, 232 U.S. 117, 121-23 (1914).[12] That *Barnes* remains sound law is confirmed by this Court's extensive reliance on it in *Sereboff v. Mid Atlantic Medical Services, Inc.*, 547 U.S. 356 (2006). Regardless of who has the right to apply for an attorney fee under EAJA, or even to receive it in the first instance, the attorney's equitable lien is itself a property interest subject to constitutional protection against government confiscation. *Cf. Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 798 (1983) ("a mortgagee clearly has a legally protected property interest" subject to due process protections).

Moreover, where Social Security cases are concerned, EAJA must be read in light of other statutory language both in the Social Security Act and in the uncodified 1985 reauthorization and amendment of EAJA itself, which is the basis for the award of

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[12] *See also Gisbrecht v. Barnhart*, 535 U.S. 789, 798 n.6 (2002) (recognizing that attorneys are "real parties in interest" in dispute over entitlement to fee award); *Hopkins v. Cohen*, 390 U.S. 530, 531 n.2 (1968) (same).

EAJA fees in some Social Security cases. Section 206(b) of the Social Security Act provides that it is a crime for an attorney in certain Social Security cases to "charg[e], deman[d], receiv[e], or collec[t]" any fee for services in court other than a court-awarded fee, payable directly to the attorney from an award of benefits and not exceeding 25% of the benefits awarded. 42 U.S.C. § 406(b)(1).[13] The 1985 EAJA amendments, however, also expressly authorize an award of EAJA fees in such cases: "Section 206(b) of the Social Security Act (42 U.S.C. 406(b)(1)) shall not prevent an award of fees and other expenses under section 2412(d) of title 28, United States Code." Pub. L. No. 99-80, § 3, 99 Stat. 183 (1985) (28 U.S.C. § 2412 note). The permission for EAJA awards in Social Security cases, however, is subject to the qualification that "where *the claimant's attorney receives fees* for the same work under both section 206(b) of [the Social Security] Act and [EAJA], *the claimant's attorney [must] refun[d]* to the claimant the amount of the smaller fee." *Id.* (emphasis added)

The statutory language saying that EAJA fees in Social Security Act cases, like fees under 206(b), are "receive[d]" by the attorney, and the provision for "refunds" to claimants in cases where both an EAJA and a § 206(b) fee are awarded, are most naturally read as indications that EAJA fees are payable to attorneys in Social Security cases, and that the only right the client has to receive them is as a refund

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[13] This provision is applicable to cases involving claims for Social Security benefits "under this subchapter," 42 U.S.C. § 406(b)(1)(A), which encompasses old age, survivors, and disability insurance benefits (but not SSI benefits).

from the attorney in the event that they are smaller than a fee awarded under § 206(b), where that section applies. Indeed, the government concedes that § 206(b) fees are payable directly to attorneys and not subject to offset, *see* Pet. 10, so it is highly significant that the 1985 EAJA amendments refer to EAJA fees and § 206(b) fees alike as being "receive[d]" by attorneys. As the district court concluded in *Thompson*, the statutory language reflects Congress's "implicit understanding that compensation to plaintiffs for EAJA legal costs would be directed to plaintiffs' attorneys," because the "amendment's direction to refund EAJA attorney fees would make no sense if the attorneys involved had not received EAJA payments from the government and had nothing to refund." 2009 WL 537512, at *4.[14]

More broadly, the model of EAJA that underlies the government's merits arguments is incompatible with the reality of fee relationships in Social Security Act cases. The government posits that EAJA is designed to compensate parties for amounts they have paid or otherwise owe their attorneys. *See* Pet. 8-11. That view may be accurate with respect to some other types of EAJA cases, but not to Social Security Act cases.

In a Social Security case such as this one, involving SSI benefits, the claimant by definition has "little

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[14] Even if this reading of the statute is not conclusive, it at least indicates that EAJA cannot be read as an unambiguous direction that EAJA fees be payable directly to Social Security claimants. Thus, resolving the issue requires consideration of the statute's context, purposes and history. *See Quade v. Barnhart*, 570 F. Supp. 2d at 1171.

or no income," http://www.ssa.gov/ssi/index.htm, and requires cash assistance to meet her basic needs for food, clothing, and shelter. Such a claimant obviously cannot and does not pay attorneys' fees as her case proceeds. That fact is even more apparent when the claimant, like Ms. Kills Ree, has been granted *in forma pauperis* status, reflecting a judicial determination that she cannot even afford the filing fee for her action. As this Court long ago recognized, "if a person is too poor to pay the costs of a suit, sometimes very small in amount, how can it be imagined that he could possibly pay a fair [attorney] fee except from the recovery he obtains?" *Adkins v. E. I. du Pont de Nemours & Co.*, 335 U.S. 331, 343 (1948).

Moreover, as noted earlier, in Social Security cases that are subject to § 206(b) of the Social Security Act the client could *never* have any obligation independent of an EAJA award to pay the attorney any fees directly, and it would be a crime for the attorney even to attempt to impose such an obligation. 42 U.S.C. § 406(b)(1).

Thus, the government's assertion that "a party may pay some or all of her attorney's bills during the course of litigation," Pet. 10, is inapplicable to Social Security Act cases for two reasons: SSI claimants are by definition indigent and unable to pay fees, and in old age, survivor's and disability insurance benefit cases that are subject to § 206(b), such payments are expressly forbidden by statute on pain of criminal penalties for the attorney. An EAJA award in such cases is thus necessarily an award of fees that the client has not already paid to the attorney. Put differently, an EAJA award is not compensation to the client for a debt owed or previously paid, but rather

payment for an attorney who, in a Social Security case, has not received and will not otherwise receive a fee from the client.

Given that practical and legal framework, a holding that the client in a Social Security Act case has some personal entitlement to an EAJA fee (outside of the circumstance where she is statutorily entitled to a refund of the fee because the attorney has received a larger fee under § 206(b) of the Social Security Act), or that such a fee may be drawn on to repay the client's personal debts, would result in an "unintended windfall" both to the client and to the client's creditors (here, the government). *Quade*, 570 F. Supp. 2d at 1174. It would also run directly counter to the evident purpose of the legislation allowing EAJA fees in Social Security Act cases, which was not to compensate clients for amounts they already paid their attorneys, but to provide an incentive for attorneys to represent Social Security Act claimants by allowing them to receive fees that they otherwise would not collect from their clients.

Moreover, although payment of the EAJA fee to the client might provide a "windfall" benefit to a needy client in any one case, overall, *potential* clients will suffer severely if EAJA fees are subject to offset—and in precisely the way that EAJA was intended to avoid. As this Court has recognized, EAJA's "specific purpose" is to help people who are not wealthy overcome financial barriers that prevent them from "challeng[ing] unreasonable governmental actions." *Commissioner, INS v. Jean*, 496 U.S. 154, 163 (1990). Providing EAJA fees to attorneys who, without other means of payment, have taken on liti-

gation on behalf of indigent Social Security claimants directly advances this manifest statutory purpose:

> [A]llowing fee awards to pro bono counsel under the EAJA "serves to insure that legal services groups, and other pro bono counsel, have a strong incentive to represent indigent social security claimants." *Ceglia v. Schweiker*, 566 F. Supp. 118, 123 (E.D.N.Y. 1983). If attorneys' fees to pro bono organizations are not allowed in litigation against the federal government, it would more than likely discourage involvement by these organizations in such cases, effectively reducing access to the judiciary for indigent individuals. Such a result surely does not further the goals of the EAJA.

Cornella v. Schweiker, 728 F.2d 978, 986-87 (8th Cir. 1984).

This Court held many years ago that construing the *in forma pauperis* statute to require attorneys to bear the relatively modest burden of paying court costs on behalf of indigent clients out of statutory fee awards would frustrate the statute's purpose by "restricting the opportunities of the poor litigant in getting a lawyer." *Adkins*, 335 U.S. at 343. Construing EAJA to make lawyers, in effect, pay their clients' debts to the federal government out of the lawyers' modest compensation would have a still more devastating effect on the ability of Social Security claimants who owe even small sums to the government to obtain counsel. EAJA fees themselves, which are subject to a below-market statutory rate cap, *see Richlin Sec. Serv. v. Chertoff*, 128 S. Ct. 2007 (2008), are already often insufficient to attract competent attorneys to represent Social Security claimants in

federal court actions. As the district court explained in *Quade*, subjecting fees to offset would only make matters worse:

> [T]he likelihood of a chilling effect ... is a real result in social security disability cases. As evidenced from the numerous cases in which awards of attorney's fees have already been used to pay the debts of clients, attorneys are losing their earned fees. This is predictable in the social security benefits context. Plaintiffs are disabled people, unable to pursue gainful employment and frequently in distressed financial circumstances. This is exacerbated by the years it takes to pursue a claim through both the administrative process as well as the court process. Moreover, as here, the fee award is usually quite modest as compared to an award under 42 U.S.C. § 1988, which is usually in the tens or hundreds of thousands of dollars. The potential for an entire fee award to be offset in the Social Security context is great given both the modest means of many claimants and the relatively small fee awards in the typical cases.

570 F. Supp. 2d at 1173.

This case provides a telling illustration of the *Quade* court's point. The claimant, Ms. Kills Ree, is impoverished and has multiple disabilities. The Social Security Administration mistakenly determined the commencement date of her benefits in a decision that the government ultimately could not defend in court. Because the agency had denied her administrative appeal, however, she had no way of obtaining the wrongfully withheld benefits other than filing suit with the assistance of Ms. Ratliff, who agreed to

represent her. Ms. Ratliff had to file an action in federal court and engage in motions practice to obtain the remand to which her client was entitled. Because her client was indigent and could not afford to pay her, Ms. Ratliff's sole source of compensation for her efforts on Ms. Kills Ree's behalf was EAJA. For those efforts, the court awarded the very modest sum of $2,112.60 (plus the small amount for sales tax payable to the state), the reasonableness of which the government did not contest.

The government's offset, however, left Ms. Ratliff with *no* compensation for her successful work in Ms. Kills Ree's case. It takes little imagination to conclude that few attorneys will consider it worth their while to assist Social Security claimants if they stand to receive no compensation at all, even in those cases where they not only succeed, but where the government's position was not even substantially justified.

As the many Social Security cases in which EAJA fee awards are issued demonstrate, the result of impeding claimants' access to counsel would be to leave standing a great many decisions in which benefits were wrongly denied to needy claimants, very often without substantial justification. The importance of EAJA in fostering judicial review of unjustifiable Social Security benefits denials is illustrated by the statistics cited by this Court in *Commissioner v. Jean*, demonstrating that "[n]inety percent of EAJA fee awards are made in cases involving the Department of Health and Human Services." 496 U.S. at 164 n.12. This Court should decline the government's invitation to take this case for the purpose of depriving practitioners such as Ms. Ratliff of the very modest

fees (averaging less than $3000 per case at the time of the *Jean* decision, *id.*) that they earn for assisting Social Security claimants with meritorious cases and erecting new barriers between such claimants and the legal assistance they so desperately need.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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June 2009

APPENDIX

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

CATHERINE G. RATLIFF,	)	CIV. 06-5070-RHB
	)	
Plaintiff,	)	
	)	
vs.	)	JUDGMENT
	)	
MICHAEL ASTRUE[1], Commissioner of Social Security,	)	
	)	
Defendant.	)	

Based upon the Court's Order dated this same day, it is hereby

ORDERED, ADJUDGED, and DECREED that judgment shall be entered in favor of plaintiff in the total amount of $3,105.57, and against defendant.

Dated this 14th day of January, 2009.

BY THE COURT:

Richard H. Battey

RICHARD H. BATTEY
UNITED STATES DISTRICT JUDGE

---

[1]Jo Anne B. Barnhart was the named party when the suit was commenced. Michael Astrue is the current Commissioner of Social Security and as such, has replaced Jo Anne B. Barnhart as a party in this action.

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

CATHERINE G. RATLIFF,	)	CIV. 06-5070-RHB
	)	
Plaintiff,	)	
	)	
vs.	)	ORDER
	)	
MICHAEL ASTRUE[1], Commissioner of Social Security,	)	
	)	
Defendant.	)	

Plaintiff commenced this action seeking payment in full of the award of Equal Access to Justice Act (EAJA) fees for the representation of two clients who were seeking benefits from the Social Security Administration. The government reduced the EAJA fee awards based upon the debts owed by the clients, reasoning that the award of fees was to the clients and not to the attorney. This Court agreed with the government's position and found that the fees were awarded to the clients as prevailing parties and not to the attorney. Furthermore, the Court determined that those awards were properly reduced. Plaintiff appealed.

---

[1]Jo Anne B. Barnhart was the named party when the suit was commenced. Michael Astrue is the current Commissioner of Social Security and as such, has replaced Jo Anne B. Barnhart as a party in this action.

In an opinion dated September 5, 2008, the Eighth Circuit reversed this Court's decision. Specifically, the Eighth Circuit held that "EAJA fee awards become the property of the prevailing party's attorney when assessed and may not be used to offset the claimants debt." Ratliff v. Astrue, 540 F.3d 800, 802 (8th Cir. 2008).

The petition for en banc rehearing having been denied, and the mandate having issued on December 12, 2008, this Court is required to act in accordance with the Eighth Circuit's opinion. As a result, the Court concludes that the EAJA awards are the property of plaintiff and that they were improperly reduced by defendant. Accordingly, it is hereby

ORDERED that defendant shall pay to the plaintiff the EAJA fees which have been awarded to her in the amounts of $866.02 and $2,239.55.

Dated this 14th day of January, 2009.

BY THE COURT:

Richard H. Battey

RICHARD H. BATTEY
UNITED STATES DISTRICT JUDGE

REPLY BRIEF

AUG 13

No. 08-1322

In the Supreme Court of the United States

MICHAEL J. ASTRUE,
COMMISSIONER OF SOCIAL SECURITY, PETITIONER

v.

CATHERINE G. RATLIFF

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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In the Supreme Court of the United States

No. 08-1322

MICHAEL J. ASTRUE,
COMMISSIONER OF SOCIAL SECURITY, PETITIONER

v.

CATHERINE G. RATLIFF

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

The court of appeals in this case held that attorney fees awarded under the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412(d), cannot be reduced to satisfy a debt owed to the United States by the prevailing party who obtained the fee because, in the court's view, EAJA fees "are awarded to the prevailing parties' attorneys, rather than to the parties themselves." Pet. App. 1a-2a, 4a. That holding is inconsistent with EAJA's clear directive that a court may "*award to a prevailing party* other than the United States fees and other expenses," 28 U.S.C. 2412(d)(1)(A) (emphasis added), and squarely conflicts with the holdings of at least three courts of appeals. See *Stephens* v. *Astrue*, 565 F.3d 131, 137 (4th Cir. 2009) (holding that "clear statutory text" specifies that EAJA fees "are payable to the claimant, not the

attorney," and therefore "are subject to administrative offset"); *Reeves* v. *Astrue*, 526 F.3d 732, 738 (11th Cir.) (same holding based on EAJA's "unambiguous text"), cert. denied, 129 S. Ct. 724 (2008); *Manning* v. *Astrue*, 510 F.3d 1246, 1249-1250, 1256 (10th Cir. 2007) (same), cert. denied, 129 S. Ct. 486 (2008); see also Pet. 13-14 & n.4; *FDL Techs., Inc.* v. *United States*, 967 F.2d 1578, 1580 (Fed. Cir. 1992) (holding that EAJA awards are payable to the prevailing party rather than her attorney in a case that did not involve a statutory offset).

The court of appeals recognized that its holding conflicted with decisions of "many courts" of appeals and ran contrary to a "literal interpretation" of EAJA's text. Pet. App. 2a-3a (citing, *e.g.*, *Reeves*, *Manning*, and *FDL Techs.*). That division of authority, on a question that is significant and recurring (Pet. 13-16), warrants resolution by this Court. Respondent's arguments against review are unavailing.

A. This Case Presents An Appropriate Vehicle To Resolve An Entrenched Circuit Split On The Question Presented

Respondent contends that this case is a poor vehicle to resolve the question presented and that review should wait until the division of authority has deepened. Br. in Opp. 12-20 (Opp.). Neither contention has merit.

1. Respondent argues (Opp. 12-15) that because the court of appeals issued its mandate reversing the district court and the district court subsequently entered judgment against the government, review by this Court is inappropriate. But this case neither became moot nor was terminated (Opp. 13-15) when the district court *sua sponte* concluded that it must "act in accordance with the Eighth Circuit's opinion" by entering judgment for respondent (Opp. App. 1a, 3a). The government timely

petitioned for a writ of certiorari from the appellate decision on which the district court's judgment rests, and nothing required the government to notice a separate appeal from that judgment to seek this Court's review.

It is well settled that "obedience to the mandate of the Court of Appeals and the judgment of the District Court does not moot [a] case" that is otherwise properly before this Court for review. *Mancusi* v. *Stubbs*, 408 U.S. 204, 205-207 (1972); see, *e.g.*, *Norfolk & W. Ry.* v. *American Train Dispatchers Ass'n*, 499 U.S. 117, 126 n.2, 128 n.3 (1991) (an order on remand "predicated * * * on the correctness of the Court of Appeals' [decision]" reflects compliance with the appellate mandate that "does not moot the issue of the correctness of the [appellate] court's decision"); *Bakery Sales Drivers Local Union No. 33* v. *Wagshal*, 333 U.S. 437, 442 (1948); *Aetna Cas. & Sur. Co.* v. *Flowers*, 330 U.S. 464, 467 (1947). A district-court judgment entered on remand therefore poses no barrier to certiorari review because "reversal of [the court of appeals'] decision would reinstate the judgment" initially entered by the district court and reversed on appeal. *United States* v. *Villamonte-Marquez*, 462 U.S. 579, 581 n.2 (1983); see *Nike, Inc.* v. *Kasky*, 539 U.S. 654, 674 (2003) (Breyer, J., dissenting from dismissal of a writ of certiorari) (reversal "would reinstate the judgment" reversed on appeal).

In *Villamonte-Marquez*, for instance, the court of appeals reversed judgments of conviction and remanded for further proceedings based on its conclusion that the government's key evidence was inadmissible. The appellate mandate issued, and the district court entered a final judgment on remand that granted the government's own motion to dismiss the indictments. This Court then granted the government's subsequent and

timely petition for a writ of certiorari. In addressing jurisdiction, the Court specifically rejected the contention that the district court's post-mandate dismissal rendered the case moot, holding instead that reversal of the court of appeals' judgment "would reinstate the judgment" that the district court originally had entered in the case. 462 U.S. at 581 n.2; cf. *id.* at 594-596 (Brennan, J., dissenting). The same principle governs here.

Indeed, respondent acknowledges that the "ministerial entry of judgment in the district court" after an appellate judgment will not "defeat[] this Court's jurisdiction." Opp. 14 (citing *Carr* v. *Zaja*, 283 U.S. 52 (1931)). That rationale applies to this case. The parties here have never disputed the amount of fees to be awarded. Cf. Pet. App. 22a-23a. Rather, the contested issue on appeal was whether that award payment was subject to an offset to collect a pre-existing, delinquent debt owed to the government by respondent's client. Once the Eighth Circuit rendered its decision, the district court's entry of judgment merely effectuated the court of appeals' holding that the government could not lawfully offset respondent's "fee awards to cover the claimant's debts" because EAJA awards must be paid to a prevailing party's attorney. See *id.* at 4a; Opp. App. 3a.

Respondent's contention (Opp. 12-13) that a final judgment moots an interlocutory appeal mistakenly relies on decisions demonstrating that appeals from preliminary injunctions generally become moot once permanent relief issues. Appellate review of a preliminary injunction is normally pointless in such circumstances because any error will generally be harmless once a "final injunction establishes that the defendant should not have been engaging in the [enjoined] conduct." *Grupo Mexicano de Desarrollo S.A.* v. *Alliance Bond*

Fund, Inc., 527 U.S. 308, 314-315 (1999) (emphasis omitted); cf. *Harper ex rel. Harper* v. *Poway Unified Sch. Dist.*, 549 U.S. 1262 (2007) (per curiam). But that injunction-specific principle does not apply to interlocutory rulings more generally. Rather, the jurisdictional inquiry here is governed by the established principle that a litigant's "obedience to the mandate of the Court of Appeals and the judgment of the District Court" poses no barrier to this Court's review of the dispositive court of appeals ruling. See *Mancusi*, 408 U.S. at 206-207; pp. 3-4, *supra*; see also *Villamonte-Marquez*, 462 U.S. at 581 n.2.

2. Respondent's contention (Opp. 18-20) that review should be deferred to allow further development of the law in the courts of appeals is unpersuasive. The Eighth Circuit's EAJA decision in this case is in square conflict with rulings of the Fourth, Tenth, and Eleventh Circuits, and contradicts as well the Federal Circuit's holding, in a case not involving an offset, that EAJA awards belong to the prevailing party, rather than her attorney. See pp. 1-2, *supra*. The Fifth Circuit in *Marré* reached the same conclusion as the Eighth Circuit in interpreting materially identical text in a fee-shifting statute modeled on EAJA—a holding the Eighth Circuit treated as directly applicable in the EAJA context. Pet. 15. And, while the Sixth and Ninth Circuits are not bound by their unpublished decisions, those courts have issued unpublished opinions on whether EAJA fees belong to the attorney or the prevailing party that reach results in conflict with each other. Compare Pet. 14 n.4 with Opp. 19 & n.9.

These decisions of eight courts of appeals have thoroughly ventilated the question presented here. Further litigation in the lower courts is unlikely to clarify the

competing arguments further, and it will not eliminate the current circuit conflict.[1] Respondent suggests (Opp. 20) that, if further litigation causes the conflict to grow more lopsided, the Eighth Circuit might reverse course and align itself with the prevailing view. But the mere possibility that the court of appeals might in the future decide that it erred in ruling for respondent is not a sound basis for denying review of that error here. The Eighth Circuit acknowledged in this case that its holding conflicts with the decisions of the majority of courts to have addressed the issue, and it has twice denied rehearing en banc to resolve that conflict. Pet. App. 2a-3a, 17a; see Pet. App. at 2a, 5a, *Astrue* v. *Wilson*, No. 08-1335 (filed Apr. 29, 2009).

Nor do this Court's denials of certiorari in *Reeves* and *Manning* suggest that review is presently unwarranted. Cf. Opp. 18-20. The government advised the Court in those cases that certiorari was premature because it hoped the circuit split could be eliminated through a then-pending petition for en banc review of the Eighth Circuit decision now at issue. See Br. in Opp. at 18-19, *Reeves*, *supra* (No. 08-5605); Br. in Opp. at 14-15, *Manning*, *supra* (No. 07-1468). The Eighth Circuit denied rehearing on December 5, 2009 (Pet. App. 17a), after the Court denied certiorari in *Manning*. The government promptly informed this Court of that denial by letter on the afternoon of December 5. Although the

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[1] After the government filed its petition in this case, it determined that the prevailing parties in *Thompson* v. *Astrue*, No. 09-1724 (2d Cir.), *Abeytia* v. *Astrue*, No. 09-15832 (9th Cir.), and *McMahon* v. *Astrue*, No. 09-15873 (9th Cir.), did not owe debts that could be offset against their EAJA awards. The government accordingly has moved to dismiss its appeals in those cases because the appeals would have no impact on the public fisc. Cf. Pet. 16 n.6; Opp. 19 n.8.

Court did not deny certiorari in *Reeves* until December 8, the case was scheduled for conference on December 5, and it is unclear whether the Court took the letter into account in denying certiorari. Cf. 08-5605 Docket entry (Nov. 20, 2008). Given the Eighth Circuit's denial of the government's petition for rehearing, review of the circuit split on the question presented in this case is no longer premature.

3. Respondent correctly notes (Opp. 15-16) that, in most cases presenting the question here, the offset issue has arisen within the same proceeding in which the underlying EAJA award was made. In this case, by contrast, respondent is an attorney who commenced a separate action in her own name after the government offset the fee award to collect the client's pre-existing, delinquent debt. It is undisputed, however, that the court of appeals' interpretation of EAJA in this lawsuit squarely conflicts with the interpretation that has been rendered in EAJA cases by other courts of appeals, and the Eighth Circuit itself has deemed its ruling in this case dispositive in resolving EAJA disputes. Pet. App. at 2a, *Wilson*, *supra* (No. 08-1335). The court's conclusion that no offset was available rested squarely on its determination that "EAJA attorneys' fees are awarded to prevailing parties' attorneys" rather than to the prevailing parties themselves. Pet. App. 4a. Although the attorney's appearance as a party is atypical of the cases in which this issue has been litigated, that peculiarity—which accurately reflects that the attorney, rather than the claimant, is the beneficiary of the Eighth Circuit's approach—will not affect the Court's consideration of the disputed question.

Rather than identify alternative grounds for affirming the judgment in her favor, respondent takes the un-

conventional approach of suggesting (Opp. 15-18) various grounds on which the government might have prevailed. But the undeveloped jurisdictional theories that respondent proffers present no barrier to this Court's review. Respondent had Article III standing to assert her APA claim that the EAJA award at issue should have been paid to her as the attorney whose fees were at stake. When the court of appeals ruled in respondent's favor on the proper interpretation of EAJA, her asserted monetary injury-in-fact was redressable by an order directing the government to pay the award to respondent. See *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 88-89 (1998); cf. *Gisbrecht* v. *Barnhart*, 535 U.S. 789, 798 n.6 (2002) (explaining that prevailing parties may nominally pursue fee awards under 42 U.S.C. 406(b) that are paid directly out of their recoveries to their attorneys even though "the real parties in interest are their attorneys"). Similarly, the APA's waiver of sovereign immunity, 5 U.S.C. 702, and Congress's grant of general federal-question jurisdiction under 28 U.S.C. 1331, provided statutory jurisdiction for this APA challenge to agency action. See *Bowen* v. *Massachusetts*, 487 U.S. 879, 891-901 (1988); *Califano* v. *Sanders*, 430 U.S. 99, 105-107 (1977).

Respondent's suggestion of possible non-jurisdictional defects in her own case also provide no reason to deny review. Although respondent correctly notes (Opp. 18) that the court of appeals here, unlike other courts, stated that an unlawful Fourth Amendment seizure resulted from the reduction of the EAJA award by offset, the court's decision contains no constitutional analysis and rests exclusively on its construction of EAJA. Pet. App. 2a-4a. And, to the extent respondent suggests that non-jurisdictional bases might justify reversal (rather

than affirmance) of the judgment below, any such arguments have been abandoned, were neither pressed nor passed upon by the court of appeals, and could not be properly raised before this Court. All that remains to support the court of appeals' judgment is an interpretation of EAJA that is the subject of an entrenched circuit split. This petition should be granted to review that judgment.

B. The Decision Of The Court Of Appeals Is Incorrect

Respondent's defense of the court of appeals' judgment on the merits (Opp. 21-30) provides no basis for denying certiorari. Respondent's brief discussion of EAJA's language (Opp. 21) largely ignores the textual bases for concluding that EAJA awards belong to the prevailing party, not her attorney. See Pet. 8-9. Thus, respondent does not address EAJA provisions directing that fees and other expenses "shall [be] award-[ed] to a prevailing party," and requiring the "prevailing party"—not her attorney—to show that she "is eligible to receive an award under [EAJA]." 28 U.S.C. 2412(d)(1)(A) and (B).

The understanding that EAJA awards are payable to the prevailing party is consistent with the rule that an EAJA award may be ordered in addition to a fee award under 42 U.S.C. 406(b) "if, where the claimant's attorney receives fees for the same work under both [provisions], the claimant's attorney refunds the claimant the amount of the smaller fee." 28 U.S.C. 2412 note; compare Pet. 3 with Opp. 23. Contrary to respondent's contention (Opp. 23), that provision does not suggest that EAJA fees are payable directly to the attorney. Rather, it simply recognizes that the attorney may ultimately receive the fees and addresses the proper approach when that

event occurs. See *Stephens*, 565 F.3d at 139 (explaining that this provision "does not presuppose that attorney's fees under the EAJA are directly payable to the attorney, but merely rests on the 'uncontroversial proposition that Congress anticipated attorneys will often be the ultimate beneficiaries of the attorney's fees awarded under the EAJA'") (quoting *Reeves*, 526 F.3d at 737). In that respect, the provision contrasts with 42 U.S.C. 406(b), which authorizes the Commissioner in a Social Security case in which the claimant was represented by counsel to certify a "fee for payment to such attorney." See Pet. 3, 10.

Respondent's reliance (Opp. 22) on the common-law principle of an attorney's equitable lien is also misplaced. First, a common-law equitable doctrine can neither overcome the statutory offset authority enacted by Congress in 31 U.S.C. 3716, nor add to the limited statutory exemptions that Congress enacted in that provision. Second, this Court has held that, because plaintiffs rather than their attorneys are entitled to fee awards under 42 U.S.C. 1988, plaintiffs may waive, settle, or negotiate away those awards to obtain benefits for themselves. See Pet. 11 (discussing *Evans* v. *Jeff D.*, 475 U.S. 717 (1986), and *Venegas* v. *Mitchell*, 495 U.S. 82 (1990)). Respondent makes no effort to reconcile that ruling concerning an analogous fee-shifting statute with her contention that a common-law equitable lien attaches to a client's fee recovery before the client receives that award. Third, respondent's reliance (Opp. 22) on *Barnes* v. *Alexander*, 232 U.S. 117 (1914), is misplaced. *Barnes* merely concluded that a lien attaches "as soon as [the trustee] gets title to the thing." *Id.* at 121-122 (declining to decide "whether the lien attached * * * before the fund was received"). When an EAJA award payment is

subject to an administrative offset, title to the award never transfers to the prevailing party because the fee award is reduced to collect the offsetting debt before any payment is made.

Finally, respondent relies heavily (Opp. 24-29) on policy-based arguments specific to the Social Security context. Those arguments, however, cannot govern the construction of EAJA, which applies broadly to "any civil action" (other than those sounding in tort) brought by or against the United States. 28 U.S.C. 2412(d)(1)(A). The proper determination whether EAJA awards are subject to offset to collect debts owed by prevailing parties to the United States must therefore take account of the full spectrum of cases to which EAJA applies. Indeed, Congress has already addressed any special circumstances pertinent to Social Security cases by authorizing special fee compensation to be paid directly to attorneys under 42 U.S.C. 406(b). See Pet. 3; pp. 9-10, *supra*.

In short, EAJA says what it means and means what it says. Courts "shall award to a prevailing party" fees and other expenses under EAJA after that party shows, *inter alia*, that it is "eligible to receive an award under [EAJA]." 28 U.S.C. 2412(d)(1)(A) and (B). The meaning of the pertinent statutory provisions is plain, and the court of appeals erred in self-consciously departing from "a literal interpretation of the EAJA." Pet. App. 3a.

* * * * *

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

ELENA KAGAN
Solicitor General

AUGUST 2009

PETITIONER'S BRIEF

Supreme Court, U.S.
FILED
NOV 20 2009
OFFICE OF THE CLERK

No. 08-1322

In the Supreme Court of the United States

MICHAEL J. ASTRUE,
COMMISSIONER OF SOCIAL SECURITY, PETITIONER

v.

CATHERINE G. RATLIFF

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether an "award of fees and other expenses" under the Equal Access to Justice Act, 28 U.S.C. 2412(d), is payable to the "prevailing party" rather than to the prevailing party's attorney, and therefore is subject to an offset for a pre-existing debt owed by the prevailing party to the United States.

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In the Supreme Court of the United States

No. 08-1322

MICHAEL J. ASTRUE,
COMMISSIONER OF SOCIAL SECURITY, PETITIONER

v.

CATHERINE G. RATLIFF

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 540 F.3d 800. The order of the district court (Pet. App. 10a-16a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 5, 2008. A petition for rehearing was denied on December 5, 2008 (Pet. App. 17a). On February 23, 2009, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including April 6, 2009. On March 26, 2009, Justice Alito further extended the time to May 4, 2009, and the petition was filed on April 28, 2009. The petition for a writ of certiorari was granted on September 30, 2009. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent provisions are set out in the appendix to this brief (App., *infra*, 1a-13a).

STATEMENT

1. a. Congress has directed that each federal agency "shall try to collect" monetary claims owed to the United States government when the claim arises out of the agency's activities. 31 U.S.C. 3711(a); see 31 C.F.R. 901.1(a), 901.2. If an agency's attempts to collect a claim are unsuccessful, the agency, subject to exceptions not relevant here, may "collect the claim by administrative offset." 31 U.S.C. 3716(a). An agency may effect an administrative offset by "withholding funds payable by the United States" to the debtor, by cooperating with another agency to withhold such funds, or by notifying the Department of the Treasury (Treasury) of the debt for inclusion in Treasury's centralized offset program. 31 U.S.C. 3701(a)(1); see 31 C.F.R. 285.5(d)(2), 901.3(b)(1) and (c). When a legally enforceable nontax debt becomes more than 180 days delinquent, the creditor agency must notify Treasury of the debt so that Treasury can attempt an administrative offset. 31 U.S.C. 3716(c)(6); see 31 C.F.R. 285.5(d)(1), 901.3(b)(1); cf. 31 C.F.R. 285.5(b), 900.2(b) (defining delinquent).[1]

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[1] Certain types of federal payments are not subject to administrative offset under 31 U.S.C. 3716. See 31 U.S.C. 3701(d), 3716(c)(1)(C), (3)(A)(ii), (B) and (e)(2); 31 C.F.R. 285.5(e)(2). Other statutory and regulatory provisions also govern the government's collection of certain debts and reductions from certain federal payments. See, *e.g.*, 5 U.S.C. 5514 (reductions from federal salary); 26 U.S.C. 6331 (levy for federal tax debts), 6402(c)-(e) (reductions from tax refunds); 31 U.S.C. 3701(d) (tax, tariff, and certain Social Security debts); 31 U.S.C. 3720A (reductions from tax refunds); 26 C.F.R. 301.6331-1 (tax levy); 31 C.F.R.

Before attempting an offset, the creditor agency must mail to the debtor's most current known address a written notice of the type and amount of the claim, the agency's intention to collect the claim by administrative offset, and the debtor's rights under 31 U.S.C. 3716. See 31 U.S.C. 3716(a)(1); 31 C.F.R. 285.5(d)(6)(ii)(A). Those rights include the right to inspect and copy records related to the claim, the right to administrative review of the agency's determination of indebtedness, and the right to make a written agreement with the agency to repay the claim and thereby avoid an offset. 31 U.S.C. 3716(a)(2)-(4); 31 C.F.R. 285.5(d)(6)(ii)(B)-(D); cf. 31 C.F.R. 901.8 (repayment agreements). Before Treasury will implement an administrative offset, the creditor agency must certify in writing that, *inter alia*, the debt is past-due, legally enforceable, and properly subject to an administrative offset. 31 C.F.R. 285.5(d)(3)(i) and (ii). That certification must state that the agency has made a reasonable attempt to provide the debtor with the requisite notice and the opportunity to exercise her rights in connection with the debt, including her right to enter into a written repayment agreement. 31 C.F.R. 285.5(d)(3)(i), (ii) and (6).

Through the Financial Management Service (FMS), Treasury operates a centralized delinquent debt collection program known as the Treasury Offset Program. When a federal agency instructs Treasury to pay an obligation on the agency's behalf, the offset program compares the payee's name and taxpayer identifying number to the names and taxpayer identifying numbers on delinquent debts that creditor agencies have previously

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285.1-285.4, 285.5(e)(3), 285.6-285.8 (Treasury offset regulations). Those provisions are not implicated in this case.

certified to Treasury as valid, delinquent, and legally enforceable. 31 C.F.R. 285.5(b) (defining "match"). If the payee is matched to such a debt, the government's payment to that person is reduced to satisfy the debt, and FMS provides the debtor with a written notice of the administrative offset. See 31 C.F.R. 285.5(c)(2), (f)(1) and (g)(3); see also 31 U.S.C. 3716(c)(1)(A) and (7)(A).

In January 2005, FMS extended its offset program to so-called "miscellaneous" payments. Miscellaneous payments include payments of attorney fees made by Treasury on behalf of federal agencies.

b. Congress enacted the Equal Access to Justice Act (EAJA), Pub. L. No. 96-481, Tit. II, 94 Stat. 2325 (1980), to enable "certain prevailing parties to recover an award of attorney fees, expert witness fees and other expenses against the United States" in appropriate cases. H.R. Rep. No. 1418, 96th Cong., 2d Sess. 6 (1980). EAJA authorizes the court in a civil action to "award to a prevailing party other than the United States fees and other expenses * * * incurred by that party" if the position of the United States is not "substantially justified" and no special circumstances would make an award unjust. 28 U.S.C. 2412(d)(1)(A).

Before a court may "award [fees and other expenses] to a prevailing party," 28 U.S.C. 2412(d)(1)(A), the "party seeking [such] an award" must submit an application that, *inter alia*, "shows that the party is a prevailing party and is eligible to receive an award under [EAJA]." 28 U.S.C. 2412(d)(1)(B). To establish eligibility for a fee award, the applicant must demonstrate that it falls within EAJA's definition of "party"—*i.e.*, that it is an individual or small business whose net worth when the

action was filed did not exceed $2 million or $7 million, respectively, or a non-profit organization meeting specific criteria. 28 U.S.C. 2412(d)(2)(B). The applicant must also document "the amount sought" by providing in its application "an itemized statement from any attorney or expert witness representing or appearing on behalf of the party." 28 U.S.C. 2412(d)(1)(B).

c. In civil actions for review of final decisions rendered by the Social Security Administration, Congress has separately authorized reasonable attorney fees in 42 U.S.C. 406(b). See *Gisbrecht* v. *Barnhart*, 535 U.S. 789, 795 (2002). When a successful Social Security claimant "who was represented before the court by an attorney" obtains a favorable judgment, "the court may determine and allow as part of its judgment a reasonable fee for such representation, not in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment." 42 U.S.C. 406(b)(1)(A). If a court allows an attorney fee under Section 406(b), the Commissioner of Social Security (Commissioner) may certify the amount of that fee "for payment to such attorney out of, and not in addition to, the amount of" the past-due Social Security benefits owed to the claimant. 42 U.S.C. 406(b)(1)(A); see 20 C.F.R. 404.1730(a), 416.1530(a) (requiring certification of an amount specified by regulation).

If the court has determined the amount of a reasonable attorney fee under Section 406(b), the attorney for a Social Security claimant ordinarily is prohibited from "charg[ing], demand[ing], receiv[ing], or collect[ing] * * * any amount in excess of that allowed by the court" for representing the claimant in the civil action. 42 U.S.C. 406(b)(2). In 1985, however, Congress amend-

ed EAJA to relax that prohibition when certain criteria are satisfied. Specifically, Congress directed that the prohibition shall not apply with respect to "an award of fees and other expenses under [S]ection 2412(d)" of EAJA "if, where the claimant's attorney receives fees for the same work under both" Section 406(b) and Section 2412(d), "the claimant's attorney refunds to the claimant the amount of the smaller fee." See Act of Aug. 5, 1985, Pub. L. No. 99-80, § 3(2), 99 Stat. 186 (amending EAJA § 206(b)); see also *Gisbrecht*, 535 U.S. at 796.

In the context of Social Security cases, EAJA's fee-shifting provisions are potentially more generous than is Section 406(b) in at least three respects. First, under EAJA, but not under Section 406(b), a court may award fees if the claimant has not obtained any past-due benefits. Under some circumstances a Social Security claimant may qualify as a "prevailing party" eligible for EAJA fees if the district court reverses the Commissioner's denial of benefits and remands the matter to the agency for further administrative proceedings, even if the claimant does not ultimately obtain such benefits on remand. See *Shalala* v. *Schaefer*, 509 U.S. 292, 295-302 (1993). Fees under Section 406(b), by contrast, are limited to "25 percent of the total of the past-due benefits to which the claimant is entitled by reason of [the court's] judgment," 42 U.S.C. 406(b)(1)(A), and therefore are available only if the judgment leads to a benefits award. Second, EAJA fees are calculated not as a percentage of the claimant's benefit award, but rather through use of the "lodestar" method, which takes into account attorney time reasonably expended and the attorney's reasonable hourly rate. See *Gisbrecht*, 535 U.S. at 792, 796. Although fees allowed under Section 406(b) (in cases where past-due Social Security benefits are

awarded) are often greater than the EAJA fees for the same case, the "lodestar" method may sometimes produce a fee award in excess of the maximum (25% of such benefits) available under Section 406(b). Third, and perhaps most significantly, fees awarded under EAJA are payable *in addition to* any benefits that the claimant is owed. An attorney fee paid by the Commissioner under Section 406(b), by contrast, is paid "out of, and not in addition to, the amount of such past-due benefits." 42 U.S.C. 406(b)(1)(A); see *Gisbrecht*, 535 U.S. at 802 (explaining that, unlike EAJA, Section 406(b) "does not authorize the prevailing party to recover fees from the losing party," but rather "authorizes fees payable from the successful party's recovery").

2. Respondent is an attorney who represented Ruby Willow Kills Ree, a Social Security claimant, in a civil action challenging the denial of Social Security benefits. Pet. App. 18a. Kills Ree prevailed in her lawsuit. *Ibid.*[2] On January 17, 2006, the district court granted Kills Ree's unopposed motion for EAJA fees, ordering the Commissioner to "pay [Kills Ree's] claim for EAJA fees in the amount of $2,112.60 in attorney fees" and $126.75 in "other expense[s]." *Id.* at 23a. The court directed that "[j]udgment shall be entered in favor of the Plaintiff [Kills Ree] and against the [Commissioner] accordingly." *Ibid.*

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[2] The district court ruled, consistent with the government's concession in the case, that Kills Ree was entitled to benefits starting on January 28, 1999, rather than March 30, 1999, as the administrative law judge had determined. See *Kills Ree* v. *Barnhart*, Civ. No. 04-5119 (D.S.D. Sept. 28, 2005), slip op. 4, 8-9. The court "remand[ed] th[e] matter to the Social Security Administration for a determination that the Claimant's disability commenced on January 28, 1999." *Id.* at 9.

The Commissioner subsequently instructed FMS to pay the EAJA award to Kills Ree, and FMS matched Kills Ree to a delinquent non-tax federal debt that she owed to the government. See Pet. App. 21a-22a. On January 31, 2006, FMS mailed Kills Ree a notice explaining that a creditor agency had previously sent her a separate notice explaining the amount and type of debt that she owed, her rights associated with that debt, and the agency's intent to collect the debt by intercepting future federal payments to her. *Ibid.* The notice further explained that Kills Ree's $2239.35 EAJA award had been offset in its entirety to satisfy that pre-existing federal debt. *Id.* at 22a.

3. On September 11, 2006, respondent initiated the present action under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, challenging the offset as contrary to law. Pet. App. 19a. Respondent's complaint alleged that respondent "was awarded attorney fees under [EAJA]" as counsel for Kills Ree, and that the Commissioner had unlawfully seized that award "to satisfy debts allegedly owed by [Kills Ree] to the government." *Id.* at 18a-19a.[3]

The district court granted the government's motion to dismiss. Pet. App. 10a-16a. The court held that, under the plain terms of the statute, EAJA awards are payable to the "prevailing party" rather than to that party's attorney. *Id.* at 12a-13a. The court concluded

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[3] Respondent also challenged an $866 offset for a federal tax debt that was deducted from an EAJA award of $6160 obtained by a second client. See Pet. App. 19a; C.A. App. 27-28 (EAJA award); *id.* at 30 (offset notice). In the course of preparing its petition for a writ of certiorari, the government identified an independent barrier to the use of the offset mechanism with respect to that award, and subsequently refunded the money associated with that reduction.

that respondent "must seek the fees from her clients" directly and lacked standing to bring the present suit because she had not sustained an injury in fact from governmental action. *Id.* at 13a.

4. The court of appeals reversed. Pet. App. 1a-9a. The court held that "EAJA fee awards become the property of the prevailing party's attorney when assessed and may not be used to offset the claimant's debt." *Id.* at 4a. The court acknowledged that its holding conflicted with decisions of other courts of appeals, including *Manning* v. *Astrue*, 510 F.3d 1246 (10th Cir. 2007), cert. denied, 129 S. Ct. 486 (2008), and *Reeves* v. *Astrue*, 526 F.3d 732 (11th Cir.), cert. denied, 129 S. Ct. 724 (2008). Pet. App. 2a-3a. The court also stated that, if it were not constrained by circuit precedent, it might "well agree with [its] sister circuits and be persuaded by a literal interpretation" of EAJA's text awarding fees to the "prevailing party." *Id.* at 3a. The court of appeals determined, however, that "controlling Eighth Circuit precedent" compelled the conclusion that "attorneys' fees awarded under the EAJA are awarded to the prevailing parties' attorneys, rather than to the parties themselves." *Id.* at 1a-2a; see *id.* at 3a-4a (discussing prior Eighth Circuit decisions). The court therefore ruled that respondent had "standing to bring an independent action to collect the fees," and, on the merits, that the government had violated the Fourth Amendment by unreasonably seizing respondent's EAJA fee awards to satisfy the debts of her clients. *Id.* at 4a.

Judge Gruender concurred in the court's judgment. Pet. App. 4a-9a. He explained, however, that his concurrence was based solely on circuit precedent, and that the court's holding was "inconsistent with language in two Supreme Court opinions, the EAJA's plain language,

and the holdings of most other circuit courts." *Id.* at 5a. In Judge Gruender's view, "other circuit courts" had correctly recognized that "awards of attorney's fees belong to the client as the prevailing party, not to the attorney." *Id.* at 9a; see *id.* at 6a-7a. Judge Gruender also relied on this Court's conclusion that, under 42 U.S.C. 1988, "it is the party's entitlement to receive [attorney] fees," which do not "belong[] to the attorney." Pet. App. 5a-6a (quoting *Venegas* v. *Mitchell*, 495 U.S. 82, 88 (1990)). In Judge Gruender's view, this Court's construction of Section 1988 further demonstrated that the court of appeals' resolution of this case was incorrect. See *ibid.* (discussing *Venegas* and *Evans* v. *Jeff D.*, 475 U.S. 717 (1986)).

SUMMARY OF ARGUMENT

The court of appeals concluded that attorney fees under EAJA are "awarded to the prevailing parties' attorneys, rather than the parties themselves," and that EAJA awards "therefore cannot be used to offset the parties' debts to the government." Pet. App. 1a-2a. That holding cannot be squared with EAJA's text, its drafting history, or the decisions of this Court in a parallel fee-shifting context. Because EAJA awards are payable to the prevailing party, they are subject to administrative offset under 31 U.S.C. 3716 to satisfy a debt owed by that party to the United States.

1. a. EAJA directs that courts "shall award to a prevailing party"—not to that party's attorney—"fees and other expenses * * * incurred by that party." 28 U.S.C. 2412(d)(1)(A). The verb "award" is well understood in litigation contexts to mean "to give by judicial decree," *Webster's Third New International Dictionary* 152 (1986), and Congress's use of the term in Sec-

tion 2412(d) unambiguously directs courts to give EAJA fees and expenses to the prevailing party. Congress has used the term "award" to confer a right to monetary payment upon litigants in various contexts, including in another provision of EAJA, which specifies that "costs" (which are defined to exclude "the fees and expenses of attorneys") are to be "awarded to the prevailing party." 28 U.S.C. 2412(a)(1).

Other EAJA provisions confirm that conclusion. Congress manifested its intent that prevailing parties "receive" EAJA payments under Section 2412(d) by requiring the party seeking the award to submit a fee application showing that she is a "prevailing party" and "is eligible to receive [the] award." 28 U.S.C. 2412(d)(1)(B). Congress also distinguished between the prevailing party and her attorney by requiring the party's fee application to "includ[e] an itemized statement from any attorney * * * representing or appearing in behalf of the party" detailing the attorney's hourly rate and time expended on the case. *Ibid.*

The prevailing party's EAJA application must document the "amount sought" (28 U.S.C. 2412(d)(1)(B)) for the party's attorney fees, expert witness expenses, and costs for "any study, analysis, engineering report, test, or project" needed for her case. 28 U.S.C. 2412(d)(2)(A). If attorney fees were separately payable to each attorney responsible for such fees, the same presumably would be true of other litigation specialists who provide services subject to EAJA reimbursement. Nothing in EAJA's text or legislative history suggests that Congress intended for courts to partition EAJA awards in that manner. To the contrary, EAJA directs the "payment of attorney fees * * * to the prevailing party." H.R. Conf. Rep. No. 1434, 96th Cong., 2d Sess. 25 (1980).

That course properly avoids embroiling federal courts in collateral disputes over how to distribute the award between prevailing parties and their attorneys (and other hired specialists), who may disagree whether the prevailing party paid the agreed-to fees in full or in part before the court granted an EAJA award or dispute other matters concerning their relevant litigation-service contract. Such fee-collection disputes are properly resolved in the normal course outside the EAJA context.

b. When Congress drafted EAJA in 1980 and reenacted its provisions in 1985, it was aware of the attorney-fee provisions of 42 U.S.C. 406(b), which authorize the Commissioner to certify a court-determined attorney fee directly "for payment to such attorney." 42 U.S.C. 406(b)(1)(A). Congress eschewed such language in Section 2412(d), however, and instead instructed the courts to "award [fees] to a prevailing party" after that party has shown her eligibility to "receive" the award.

c. This Court's decisions construing 42 U.S.C. 1988, which authorizes courts to "allow the prevailing party * * * a reasonable attorney's fee," further demonstrate that EAJA awards are payable to the prevailing party rather than to her attorney. Those decisions teach that the prevailing party is the person entitled to receive Section 1988 fees; reject the attorney's claim of entitlement to such fees; and explain that the party may therefore waive, settle, or negotiate away such fees to obtain other benefits for herself. Those holdings are particularly significant here because this Court ordinarily construes prevailing-party fee-shifting provisions similarly and has specifically done so with respect to EAJA and Section 1988. Especially in light of EAJA's much more detailed provisions manifesting Congress's intent to give

fee awards to the prevailing party, the Court's decisions under Section 1988 directly apply to Section 2412(d).

d. The court of appeals' decision was based on Eighth Circuit precedents that contain no textual analysis or other reasoning that might provide a sound basis for the judgment below. Indeed, the court, in relying on those precedents, self-consciously departed from what it recognized was a "literal interpretation of the EAJA." Pet. App. 3a. That was error. EAJA says what it means and means what it says: Courts shall award fees and other expenses to the prevailing party, not to that party's attorneys.

2. Because EAJA awards properly are paid to the prevailing party, such an award may be reduced to satisfy a debt owed by that party to the United States. The administrative offset authority in 31 U.S.C. 3716 applies to all federal payments that are not exempted from offset, and no exemption is applicable to awards of attorney fees. The government therefore lawfully employed the administrative-offset mechanism when it used Kills Ree's EAJA award to satisfy a pre-existing debt that Kills Ree owed to the United States.

ARGUMENT

I. AWARDS OF ATTORNEY FEES AND OTHER EXPENSES UNDER EAJA ARE PAYABLE TO THE PREVAILING PARTY, NOT TO THAT PARTY'S ATTORNEY

The court of appeals held that "attorneys' fees awarded under the EAJA are awarded to the prevailing parties' attorneys, rather than to the parties themselves." Pet. App. 1a-2a. That conclusion cannot be reconciled with EAJA's clear directive that courts "shall award to a prevailing party" the fees and other expenses that are incurred by that party. 28 U.S.C. 2412(d)(1)(A).

The detailed provisions of Section 2412(d) unambiguously reflect Congress's intent that the prevailing party—not her attorney—would receive EAJA's statutory fee award. That conclusion is confirmed by EAJA's drafting history, its relationship to the Social Security attorney-fee provisions of 42 U.S.C. 406(b), and the decisions of this Court construing the fee-shifting language of 42 U.S.C. 1988. Indeed, every other court of appeals that has addressed the question has concluded that the plain meaning of the pertinent statutory provisions is that EAJA fee awards are payable to the prevailing party. The Eighth Circuit erred by self-consciously departing from what it acknowledged was a "literal interpretation of the EAJA." Pet. App. 3a.[4]

A. EAJA Unambiguously Provides That Awards Of Fees And Other Expenses Are Payable To Prevailing Parties, Rather Than To Their Attorneys

1. EAJA provides that, in circumstances where an award is appropriate and "[e]xcept as otherwise specifi-

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[4] Although the court of appeals stated that an unlawful Fourth Amendment seizure resulted from the offset of Kills Ree's EAJA award, Pet. App. 4a, the court's decision contains no constitutional analysis and rests exclusively on its construction of EAJA. *Id.* at 2a-4a. We therefore understand the court's decision in this APA case (*id.* at 19a) to be grounded in its conclusion that the offset to collect Kills Ree's debt to the United States was contrary to law, 5 U.S.C. 706(2)(A), because the EAJA award was payable not to Kills Ree but to respondent as her counsel. Pet. App. 1a-2a. Respondent had Article III standing (*id.* at 4a) to pursue that APA claim: her asserted monetary injury-in-fact is fairly traceable to the challenged agency action and would be redressable by a judicial order directing the government to pay the EAJA award to respondent. See *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 88-89 (1998). Thus, while the court of appeals erred in its merits ruling for the reasons discussed *infra*, the courts below had jurisdiction to resolve respondent's claim.

cally provided by statute, a court shall *award to* a *prevailing party* * * * fees and other expenses * * * incurred by that party." 28 U.S.C. 2412(d)(1)(A) (emphases added). That directive unambiguously reflects Congress's intent to give EAJA fee awards to prevailing parties rather than directly to their attorneys.

The transitive verb "award" is well understood in litigation contexts to mean "to give by judicial decree." *Webster's Third New International Dictionary* 152 (1986) (first non-obsolete definition); accord *Black's Law Dictionary* 125 (5th ed. 1979) ("To give or assign by sentence or judicial determination" as when a "court *awards* an injunction."); see *Random House Dictionary of the English Language Unabridged* 144 (2d ed. 1987) ("to bestow by judicial decree" such as in "*[t]he plaintiff was awarded damages*"); *American Heritage Dictionary of the English Language* 92 (1976) ("To declare as legally due: *awarded damages to the plaintiff.*"). When joined with the prepositional phrase "to a prevailing party," the term expresses Congress's clear intent that a court's decree shall give the fees and other expenses authorized by Section 2412(d) to the prevailing party.

In various contexts, Congress has used the term "award" to direct that the courts give monetary payments to specified classes of litigants. *E.g.*, 17 U.S.C. 1009(d)(1)(A)(i) ("the court shall award to the complaining party its actual damages").[5] EAJA follows that

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[5] See also, *e.g.*, 17 U.S.C. 1203(c)(2) ("The court shall award to the complaining party the actual damages suffered by the party as a result of the violation."); 29 U.S.C. 216(b) (court shall allow a reasonable attorney fee "in addition to any judgment awarded to the plaintiff"); 29 U.S.C. 431(c) (court may allow a reasonable attorney fee "in addition to any judgment awarded to the plaintiff"); 29 U.S.C. 2617(a)(3) (court shall allow a reasonable attorney fee "in addition to any judgment

trend. For instance, Congress specified in EAJA that "a judgment for costs, as enumerated in [28 U.S.C. 1920], but not including the fees and expenses of attorneys, may be awarded to the prevailing party." 28 U.S.C. 2412(a)(1). No one has disputed that the phrase "award[] to the prevailing party" in Section 2412(a)(1) directs the payment of "costs" to the prevailing party, rather than her attorney. And if that is so, the self-same phrase in Section 2412(d) must be taken to direct the payment of legal fees and expenses to the party, and not her lawyer. Where, as here, Congress employs "identical words and phrases within the same statute," they are presumptively understood to carry "the same meaning." *Arthur Anderson LLP* v. *Carlisle*, 129 S. Ct. 1896, 1901 n.4 (2009) (quoting *Powerex Corp.* v. *Reliant Energy Servs., Inc.*, 551 U.S. 224, 232 (2007)); see *LaRue* v. *DeWolff, Boberg & Assocs., Inc.*, 128 S. Ct. 1020, 1027 (2008) (stating the Court's "usual preference for construing the 'same terms [to] have the same meaning in different sections of the same statute'") (citation omitted; brackets in original); *Estate of Cowart* v. *Nicklos Drilling Co.*, 505 U.S. 469, 479 (1992) (stating "the basic canon of statutory construction that identical terms within an Act bear the same meaning"). Nothing in Section 2412(d) suggests that Congress intended a departure from this "normal rule of statutory construction." *Department of Revenue* v. *ACF Indus., Inc.*, 510 U.S. 332, 342 (1994) (citation omitted).

The courts of appeals that have analyzed EAJA's relevant text have consistently recognized that the statutory language is "plain" and that "the prevailing party,

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awarded to the plaintiff"); 42 U.S.C. 3613(c)(1) ("court may award to the plaintiff actual and punitive damages").

and not her attorney, is the proper recipient of attorney fees under EAJA." *Bryant* v. *Commissioner of Soc. Sec.*, 578 F.3d 443, 447-448 (6th Cir. 2009) (discussing Section 2412(d)(1)(A)); accord *Stephens* v. *Astrue*, 565 F.3d 131, 137 (4th Cir. 2009) (same holding based on "the clear statutory text" of Section 2412(d)(1)(A)); *Reeves* v. *Astrue*, 526 F.3d 732, 735 (11th Cir.) (Section 2412(d)(1)(A) "unambiguously directs the award of attorney's fees to the party * * * and not to the party's attorney."), cert. denied, 129 S. Ct. 724 (2008); *Manning* v. *Astrue*, 510 F.3d 1246, 1249-1250 (10th Cir. 2007) (same holding based on Section 2412(d)(1)(A)'s "clear[]" statutory language), cert. denied, 129 S. Ct. 486 (2008); *FDL Techs., Inc.* v. *United States*, 967 F.2d 1578, 1580 (Fed. Cir. 1992) (expressing same holding based on materially identical text in EAJA's provision for agency adjudications, 5 U.S.C. 504(a)(1), and explaining that the court's analysis applies equally to Section 2412(d)(1)(A)). Even the court of appeals in this case did not dispute the import of this "literal interpretation of the EAJA," concluding instead that it was bound by circuit precedent to depart from EAJA's text. Pet. App. 3a.

2. Even if Section 2412(d)(1)(A)'s directive to "award [fees and other expenses] to a prevailing party" were ambiguous, EAJA's other provisions confirm that the litigant, rather than her attorney, is the proper recipient of an EAJA fee award.

a. EAJA specifies that the "party seeking an award of fees and other expenses" must submit an application that "shows that the party is a prevailing party and is eligible to receive an award under [Section 2412(d)]." 28 U.S.C. 2412(d)(1)(B). That requirement that a prevailing party must prove her entitlement to "receive" EAJA fees before a court may "award [fees] to a prevailing

party" confirms Congress's intent that courts shall direct the government's payment of EAJA fees to the prevailing party. If, as the court of appeals held, attorneys were entitled to a direct EAJA payment from the government, the prevailing party would never "receive" the fee award after having established that it is she—not her attorney—who "is eligible to receive [the] award," *ibid.*

Indeed, the content of the fee application itself, as specified in Section 2412(d), clearly distinguishes between the "prevailing party" and the "attorney" who represents her. Under that provision, the application of the "prevailing party" must establish "the amount sought, including an itemized statement from any attorney * * * representing or appearing in behalf of the party." 28 U.S.C. 2412(d)(1)(B). EAJA also requires that a prevailing party's fee application show that the "party" is eligible to receive a fee award by establishing, *inter alia*, that the party's net worth—not that of her lawyer—is less than the maximum amount allowed by statute. See 28 U.S.C. 2412(d)(2)(B) (defining "party"); see also 28 U.S.C. 2412(d)(1)(B); *Bryant*, 578 F.3d at 448; *Stephens*, 565 F.3d at 138; *Reeves*, 526 F.3d at 736; *Manning*, 510 F.3d at 1251. Congress's consistent differentiation of the party and her attorney in Section 2412(d)—in assigning the task of submitting the fee application and in denoting the information that the application must include—further forecloses the court of appeals' conclusion that the government must pay EAJA awards directly to the party's "attorney."

b. Moreover, EAJA's inclusion of lawyers within a broader category of experts and professionals demonstrates that Congress did not grant lawyers a special entitlement to EAJA awards. EAJA requires that the

prevailing party's EAJA application submit details regarding attorney fees as just one part of the party's overall justification for an award of litigation expenses. 28 U.S.C. 2412(d)(1)(B). Such expenses expressly include not only "reasonable attorney fees" incurred by the party, but also "the reasonable expenses of expert witnesses" and "the reasonable cost of any study, analysis, engineering report, test, or project" needed to prepare "the party's case." 28 U.S.C. 2412(d)(2)(A) (defining "fees and other expenses"). EAJA thus treats attorneys in the same manner as it treats expert witnesses and other professional specialists who provide services needed to litigate the party's case. See *Bryant*, 578 F.3d at 448 (citing *Panola Land Buying Ass'n* v. *Clark*, 844 F.2d 1506, 1511 (11th Cir. 1988) (*Panola*)); *Reeves*, 526 F.3d at 736 (same); *Manning*, 510 F.3d at 1251 (same). Nothing suggests that any of those litigation specialists are entitled to direct payment of EAJA awards by the government. EAJA instead accounts for the fees of such specialists only when they have been "incurred by [the prevailing] party." 28 U.S.C. 2412(d)(1)(A). In this way too, EAJA's text shows Congress's intent that awards be determined from "the perspective of the litigant," not "from the perspective of the party's attorney." *Richlin Sec. Serv. Co.* v. *Chertoff*, 128 S. Ct. 2007, 2013 (2008) (construing materially identical text in EAJA's administrative adjudication provision, 5 U.S.C. 504(a)(1)).

3. The court of appeals' contrary conclusion would result in unusual and cumbersome outcomes, which there is no reason to believe Congress intended. Because the statute treats attorneys in the same way as other individuals and businesses providing litigation services—*e.g.*, expert witnesses, engineers, scientists, or other analysts, see 28 U.S.C. 2412(d)(2)(A)—the logic of

the court of appeals' holding would require direct payment from the government to any number of persons. Even if no non-attorney services were needed in a case, the court of appeals' decision would apparently require EAJA awards to be divided into multiple payments made directly to different counsel whenever a prevailing party is represented by multiple law firms.

If Congress had intended such a result, it presumably would have expressed its intent to mandate the partition of EAJA awards. But nothing in EAJA's text or legislative history suggests such an intent. To the contrary, Congress authorized "*an* award of fees and other expenses," 28 U.S.C. 2412(d)(1)(B) (emphasis added), and "specifically allow[ed] for the *payment* of attorney fees * * * *to the prevailing party*," thus "direct[ing] the United States to pay attorney fees and other expenses to [that] party." H.R. Conf. Rep. No. 1434, 96th Cong., 2d Sess. 21, 25 (1980) (emphasis added).

That legislative judgment reflects sound policy. "Except as otherwise specifically provided by statute," EAJA applies to every "civil action (other than cases sounding in tort) * * * brought by or against the United States." 28 U.S.C. 2412(d)(1)(A). In many such cases, the prevailing party may have paid some or all of the bills submitted to her by her attorneys, expert witnesses, or other specialists during the course of litigation; any one of those professionals may owe the prevailing party a separate debt; or the prevailing party and her attorney or specialists may dispute other matters concerning their relevant litigation-service contract.[6]

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[6] The Commissioner construes 42 U.S.C. 406(b) generally to prohibit attorneys from charging a Social Security claimant for their legal services in federal court litigation unless and until the claimant receives past-due Social Security benefits by reason of a court judgment. See

By making EAJA awards payable directly to the prevailing party, Congress avoided the need to have federal courts resolve such collateral issues under EAJA. Cf. *Pierce* v. *Underwood*, 487 U.S. 552, 563 (1988) (A "request for attorney's fees [under EAJA] should not result in a second major litigation.") (quoting *Hensley* v. *Eckerhart*, 461 U.S. 424, 437 (1983)). Rather, such disputes between EAJA award recipients and their attorneys or other hired professionals concerning their financial obligations to each other are appropriately resolved under applicable non-EAJA law.

In short, nothing in EAJA suggests that "all [such] persons performing services for the prevailing party in the litigation" may separately "assert their claims for compensation" against the government. *Panola*, 844 F.2d at 1511. Those professionals—including attorneys—must follow the usual course and obtain their compensation from the party who utilized their services, *ibid.*; see *Bryant*, 578 F.3d at 448; *Reeves*, 526 F.3d at 736; *Oguachuba* v. *INS*, 706 F.2d 93, 97-98 (2d Cir. 1983), because EAJA entitles only the prevailing party (and not those who provided her with litigation assistance) to receive payment of attorney fees and other expenses.

Gisbrecht v. *Barnhart*, 535 U.S. 789, 795 (2002) (noting Commissioner's interpretation); pp. 5-6, *supra*. That prohibition does not apply to an attorney's collection of fees awarded to the claimant under EAJA Section 2412(d), see pp. 24-26, *infra*, and does not extend beyond the specific context of Social Security civil actions.

B. EAJA's Relationship To 42 U.S.C. 406(b), And The Drafting History Of EAJA's Enactment And Subsequent Amendment, Show That Congress Intended EAJA Awards To Be Paid To Prevailing Parties Rather Than To Their Attorneys

EAJA's relationship to 42 U.S.C. 406(b), and the history of Congress's efforts to harmonize the two provisions, reinforce the conclusion that EAJA awards are payable to the prevailing party.

1. Section 406 generally governs the amount of a reasonable attorney fee that an attorney may charge for representing Social Security claimants in administrative and judicial proceedings. Section 406(a) governs the fee that may be charged for representing a claimant in administrative proceedings before the Commissioner. See 42 U.S.C. 406(a); *Gisbrecht* v. *Barnhart*, 535 U.S. 789, 794-795 (2002). Section 406(b), in turn, authorizes a district court to "determine and allow as part of its judgment a reasonable fee" for an attorney who successfully represents a Social Security claimant in federal court. 42 U.S.C. 406(b)(1)(A). The fee that a court may allow under that provision is capped at "25 percent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment." *Ibid.*

Section 406(b) also authorizes the Commissioner of Social Security to "certify the amount of such fee for payment to such attorney" out of the past-due benefits that the government has been found to owe. 42 U.S.C. 406(b)(1)(A). That language authorizing "attorneys [to] be paid directly" by the government was added by Congress "to ensure that attorneys representing successful claimants would not risk 'nonpayment of [appropriate] fees'" when such fees are allowed by a court under Section 406(b). See *Gisbrecht*, 535 U.S. at 804 n.13, 805

(brackets in original); see also S. Rep. No. 404, 89th Cong., 1st Sess. 122 (1965) (explaining that the provision is intended "to assure the payment of the fee * * * to the attorney"); *id.* at 19, 349; H.R. Conf. Rep. No. 682, 89th Cong., 1st Sess. 62-63 (1965).[7] EAJA, by contrast, does not contain language similar to Section 406(b)'s authorization to make direct "payment to [an] attorney" of a court-ordered fee. Section 406(b) illustrates that "Congress knows what language to use to award attorney's fees to an attorney," and Congress's failure to employ similar language in Section 2412(d) reflects its intent to make fee awards under EAJA payable to the prevailing party rather than to her attorneys. See *Manning*, 510 F.3d at 1252; accord *Bryant*, 578 F.3d at 448-449; *Stephens*, 565 F.3d at 138; *Reeves*, 526 F.3d at 736.

2. Congress was aware of the Section 406 fee provisions when it enacted EAJA in 1980 and amended it in 1985. In 1980, the Secretary of Health and Human Services advised Congress of his objection to EAJA's proposed application to Social Security proceedings. The Secretary expressed the view that the "fee-paying system" established by Section 406, which "prescribes the means by which attorneys can be paid out of benefits otherwise due their clients" for legal services in administrative and judicial proceedings, already "work[ed] well" in the Social Security context and that applying EAJA to agency proceedings could "change the very character of the SSA appeals process." See *Award of Attorneys' Fees Against the Federal Government: Hearings Before the Subcomm. on Courts, Civil Liber-*

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[7] Congress later added a parallel provision providing "for payment, out of [the claimant's] past-due benefits * * * to [the] attorney" for legal representation in administrative proceedings. See 42 U.S.C. 406(a)(4) (added 1968).

ties and the Admin. of Justice of the House Comm. on the Judiciary, 96th Cong., 2d Sess. 542 (1980) (letter from Secretary dated Aug. 28, 1980); cf. *id.* at 605 (letter from Chairman of the House Ways and Means Committee explaining that legislation concerning attorney fees in Social Security cases fell within his committee's jurisdiction and discussing attorney fees under Section 406). Congress amended EAJA's proposed text one month later to exclude SSA administrative proceedings from the scope of the bill. H.R. Rep. No. 1418, 96th Cong., 2d Sess. 12, 20 (1980). After "much discussion," however, Congress "decided that civil actions [under the Social Security Act, 42 U.S.C. 301 *et seq.*,] should be covered." *Id.* at 12.

In October 1984, Section 2412(d) and EAJA's other primary fee-shifting provision (5 U.S.C. 504) were automatically repealed pursuant to sunset provisions that Congress had enacted with EAJA in 1980. See EAJA, Pub. L. No. 96-481, §§ 203(c), 204(c), 94 Stat. 2327, 2329. In 1985, Congress reenacted the repealed provisions while making clarifying and other amendments to them. See Act of Aug. 5, 1985, Pub. L. No. 99-80 §§ 1, 2, 6(a), 99 Stat. 183-186.

As noted above (see pp. 23-24, *supra*), the legislative history of EAJA's enactment in 1980 reflected Congress's understanding that the statute would apply in civil actions under the Social Security Act. Some language in both EAJA and 42 U.S.C. 406, however, cast doubt on the correctness of that view. EAJA authorizes fee awards under Section 2412(d) only when not "otherwise specifically provided by statute," 28 U.S.C. 2412(d)(1)(A), and Section 406(b) contains two provisions suggesting that its attorney-fee provisions might be exclusive in the Social Security context. Then, as now,

Section 406(b)(1) specified that, when a court's judgment allows a reasonable fee for an attorney's representation of a Social Security claimant in court proceedings under Section 406(b), "no other fee may be payable * * * for such representation except as provided in [Section 406(b)(1)]." 42 U.S.C. 406(b)(1)(A). Section 406(b)(2) similarly made it unlawful for an attorney to "charge[], demand[], receive[], or collect[] for services rendered in connection with [such] proceedings * * * any amount in excess of that allowed by the court [under Section 406(b)(1)]." 42 U.S.C. 406(b)(2).

As part of the 1985 amendments, Congress added Section 206(b) to EAJA in order to address the circumstances in which a court may allow attorney fees under both 28 U.S.C. 2412(d) and 42 U.S.C. 406(b). See Pub. L. No. 99-80, § 3(2), 99 Stat. 186 (EAJA § 206 is reproduced as the "Savings Provision" at 28 U.S.C. 2412 note). Section 206(b) clarified that the exclusivity provision of 42 U.S.C. 406(b)(1) "shall not prevent an award of fees and other expenses under [EAJA] [S]ection 2412(d)," and that the prohibitions in Section 406(b)(2) "shall not apply with respect to any such award" if, "where the claimant's attorney receives fees for the same work under both [Section 406(b) and Section 2412(d)], the claimant's attorney refunds to the claimant the amount of the smaller fee." EAJA § 206(b), 99 Stat. 186 (28 U.S.C. 2412 note); see *Gisbrecht*, 535 U.S. at 796; pp. 5-6, *supra*.[8] Congress thus resolved the prior uncer-

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[8] By defining the attorney's obligation in a Social Security case "where the claimant's attorney receives fees for the same work under both [42 U.S.C. 406(b) and 28 U.S.C. 2412(d)]," EAJA § 206(b), 99 Stat. 186 (28 U.S.C. 2412 note), the 1985 EAJA amendments reflect Congress's understanding that EAJA awards may ultimately be "received" by the attorneys who perform the relevant services. That language

tainty regarding EAJA's application to Social Security cases by specifying that the attorney-fee provisions of Section 406(b) and Section 2412(d) are both applicable, and by requiring that, when an attorney who represents a Social Security claimant in court actually receives fees that have been ordered under both provisions, the attorney must "reduc[e] the liability of the claimant so that the claimant is the primary beneficiary of the EAJA award." H.R. Rep. No. 120, 99th Cong., 1st Sess. Pt. 1, at 19 (1985); see *Stephens*, 565 F.3d at 139; *Reeves*, 526 F.3d at 737.[9]

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simply acknowledges that lawyers who represent Social Security claimants will generally do so "on the express or implied promise of the plaintiff to pay the lawyer the statutory award, *i.e.*, a reasonable fee, if the case is won" and EAJA fees are awarded. *Venegas* v. *Mitchell*, 495 U.S. 82, 86 (1990). Congress's recognition of that practical reality does not alter EAJA's clear directive that the prevailing claimant "receive" the award in the first instance. 28 U.S.C. 2412(d)(1); see pp. 14-18, *supra*. This understanding of the term "receives" in the 1985 EAJA amendments is supported by the larger statutory context. The 1985 amendments established an exception to the general prohibition contained in 42 U.S.C. 406(b)(2), which imposes criminal penalties on "[a]ny attorney who charges, demands, *receives*, or collects for services rendered in connection with proceedings before a court to which paragraph (1) of this subsection is applicable any amount in excess of that allowed by the court thereunder." 42 U.S.C. 406(b)(2) (emphasis added). Within that prohibition, the term "receives" clearly covers receipt either from the client or from an outside source. The 1985 EAJA amendments, which relax that bar by permitting an attorney to "receive[]" fees under both Section 406(b)(1) and EAJA (so long as the attorney refunds the smaller amount to the claimant), should be understood to use the term in the same manner.

[9] EAJA Section 206(b) was adopted in the face of a "great deal of litigation" regarding the availability of EAJA awards in Social Security civil actions where courts had "com[e] down on both sides" of the issue. S. Rep. No. 586, 98th Cong., 2d Sess. 20-21 (1984). By 1985, several courts of appeals had concluded based on EAJA's pre-amendment

The 1985 amendments thus revised 28 U.S.C. 2412(d) while expressly referencing 42 U.S.C. 406(b). Although Congress specifically focused on EAJA's application to Social Security cases, and amended EAJA to make clear that the statute authorizes fee awards in such cases, it did not authorize or require a direct government "payment to [an] attorney" who represents a Social Security claimant. Had Congress intended for EAJA awards in Social Security cases to be payable directly to the attorneys who provide the relevant services, it presumably would have used language similar to that in Section 406(b). Congress instead chose to leave Social Security cases subject to the general rule that a court may "award [EAJA fees] to a prevailing party" when that party has demonstrated its eligibility to "receive" an EAJA award. 28 U.S.C. 2412(d)(1). The court of appeals erred in declining to give effect to that congressional judgment.

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legislative history (and without significant textual analysis) that EAJA fees could be awarded in civil actions under the Social Security Act. See, *e.g.*, *Cornella* v. *Schweiker*, 728 F.2d 978, 987 (8th Cir. 1984); *Wolverton* v. *Heckler*, 726 F.2d 580, 582 (9th Cir. 1984); *Berman* v. *Schweiker*, 713 F.2d 1290, 1293, 1296 (7th Cir. 1983). Some of those courts also had stated in dicta that, if attorney fees are ordered under both Section 406(b) and EAJA, "[a]ny award received by [the claimant's] counsel under the EAJA * * * must be used to reimburse [the claimant] up to the amount awarded under [Section 406(b)]." *Guthrie* v. *Schweiker*, 718 F.2d 104, 107-108 & n.11 (4th Cir. 1983); see *Watford* v. *Heckler*, 765 F.2d 1562, 1566 & n.5 (11th Cir. 1985). The 1985 EAJA amendments effectively codified that result. See H.R. Rep. No. 120, at 20 (amendments prevent possibility of "double dipping" by attorneys).

C. The Decisions Of This Court Interpreting 42 U.S.C. 1988(b) Reinforce The Conclusion That EAJA Awards Are Paid To Prevailing Parties Rather Than To Their Attorneys

Unlike the more detailed provisions governing EAJA awards under Section 2412(d), the pertinent fee-shifting language of 42 U.S.C. 1988(b) simply authorizes federal courts in certain civil-rights actions to "allow the prevailing party * * * a reasonable attorney's fee as part of the costs." 42 U.S.C. 1988(b). In *Evans* v. *Jeff D.*, 475 U.S. 717 (1986), and *Venegas* v. *Mitchell*, 495 U.S. 82 (1990), the Court made clear that attorney fees awarded under Section 1988 belong to the prevailing party rather than to her attorneys. Those holdings support the most natural understanding of EAJA's text and history.

In *Jeff D.*, the Court explained that a "straightforward reading" of Section 1988's authorization to "allow the prevailing party . . . a reasonable attorney's fee" reflects that "Congress bestowed upon the 'prevailing *party*' (generally plaintiffs) a statutory eligibility for a discretionary award of attorney's fees" and did not "bestow[] fee awards upon attorneys" themselves. 475 U.S. at 730-732 & nn.17, 19 (footnote omitted); *id.* at 719 (quoting 42 U.S.C. 1988). The Court accordingly held that a civil-rights plaintiff may use a potential attorney-fee award as a "bargaining chip" that she may waive, settle, or negotiate away to obtain other benefits for herself. *Id.* at 731-732 & n.20. The Court concluded that the plaintiff class in *Jeff D.* therefore could properly agree to forgo an attorney-fee award under Section 1988 as part of a settlement that provided for injunctive relief broader than the plaintiffs could reasonably have expected to obtain at trial. See *id.* at 722 & n.5, 729-730.

The Court in *Venegas* considered the application of Section 1988 to a fee dispute between a civil-rights plaintiff (Venegas) and his trial counsel (Mitchell). As in *Jeff D.*, the Court in *Venegas* explained that Section 1988 "by its terms" authorized the district court "to order the defendants to pay to Venegas, the prevailing party, a reasonable attorney's fee." 495 U.S. at 86. The Court also emphasized that, under Section 1988, "the party, rather than the lawyer," is "entitle[d] to receive the fees" awarded by a court. *Id.* at 87-88.

The Court in *Venegas* recognized that many if not most lawyers likely undertake civil-rights litigation "on the express or implied promise of the plaintiff to pay the lawyer the statutory award, *i.e.*, a reasonable fee, if the case is won." 495 U.S. at 86. The Court reiterated, however, that the plaintiff in such a case retains the "right to waive, settle, or negotiate" away a Section 1988 fee claim, explaining that the decision in *Jeff D.* had "rejected the argument that the entitlement to a § 1988 award belongs to the attorney rather than the plaintiff." *Id.* at 88-89. The Court elaborated that Section 1988 simply "controls what the losing defendant must pay" to the prevailing plaintiff—"not what the prevailing plaintiff must pay his lawyer." *Id.* at 90. The Court accordingly concluded that Section 1988 imposes no barrier to a plaintiff's agreement to pay his attorneys a fee greater than that which would be awarded under Section 1988. *Ibid.*; see *id.* at 86-87 ("[T]here is nothing in the section to regulate what plaintiffs may or may not promise to pay their attorneys if they lose or if they win.").

The decisions in *Jeff D.* and *Venegas* bear directly on the question presented here because this Court ordinarily construes "prevailing party" fee-shifting provisions in the same way, see *Buckhannon Bd. & Care*

Home, Inc. v. *West Va. Dep't of Health & Human Res.*, 532 U.S. 598, 603 n.4 (2001); *City of Burlington* v. *Dague*, 505 U.S. 557, 562 (1992); *Independent Fed'n of Flight Attendants* v. *Zipes*, 491 U.S. 754, 758 n.2 (1989); *Hensley*, 461 U.S. at 433 n.7, and has done so with respect to EAJA and Section 1988. See *Richlin*, 128 S. Ct. at 2014-2015 (construing EAJA to have the same meaning as similar text in Section 1988). Indeed, compared with Section 1988's general authorization to "allow the prevailing party * * * a reasonable attorney's fee as part of the costs," 42 U.S.C. 1988(b), EAJA contains much stronger textual indications that any statutory fee award belongs to the prevailing party rather than to her attorney. As previously discussed, EAJA requires that courts "shall *award to a prevailing party* * * * fees and other expenses" only after that party has shown that she "is eligible to *receive* [the] award," and EAJA specifically distinguishes between the prevailing "party" and her "attorney" by requiring the party's EAJA application to detail the hourly rate and time expended by "any attorney * * * representing or appearing in behalf of the party." 28 U.S.C. 2412(d)(1)(A) and (B) (emphases added); see pp. 14-19, *supra*. The Court's analysis in *Jeff D.* and *Venegas* therefore applies *a fortiori* to the statute at issue here.

D. The Court Of Appeals Failed To Identify A Sound Basis For Concluding That EAJA Fees Are Payable To The Prevailing Party's Attorney

In holding that "EAJA fee awards become the property of the prevailing party's attorney when assessed," Pet. App. 4a, the court of appeals made no attempt to reconcile its construction with EAJA's text. In fact, the court recognized that its decision did not comport with

a "literal interpretation" of the statute. *Id.* at 3a. The court declined to engage in such textual analysis because it viewed itself as bound by Eighth Circuit precedent. *Ibid.*

Neither of the Eighth Circuit decisions cited by the court below—*Curtis* v. *City of Des Moines*, 995 F.2d 125 (8th Cir. 1993), and *United States* v. *McPeck*, 910 F.2d 509 (8th Cir. 1990)—provides a sound basis for the court's interpretation of Section 2412(d). Cf. Pet. App. 3a-4a; *id.* at 5a & n.1 (Gruender, J., concurring). The opinion in *Curtis* contains two brief paragraphs to support its conclusion that Section 1988 fees belong to the attorney because the purpose of the statute is to "encourage attorneys to prosecute constitutional violations." 995 F.2d at 128-129. That atextual analysis is misconceived in light of this Court's earlier explanation in *Jeff D.* and *Venegas* that fee awards under Section 1988 belong to the prevailing party rather than to her attorney. See pp. 27-29, *supra*. Indeed, this Court in *Jeff D.* considered and rejected an argument similar to that adopted in *Curtis*, concluding that allowing "clients to bargain away fee awards" would not undermine Section 1988's purpose by significantly deterring lawyers from representing civil rights plaintiffs. *Jeff D.*, 475 U.S. at 741 n.34.[10]

The analysis in *McPeck* provides even less support for the court of appeals' judgment. The court in *McPeck* addressed a fee award imposed as a sanction in bankruptcy proceedings; concluded that "EAJA [was] inapplicable to th[e] case"; and adopted the government's position that, "[w]hen a statute awards attorneys' fees to

[10] The Eighth Circuit in *Curtis* cited both *Jeff D.* and *Venegas*, but did not attempt to reconcile its holding with the reasoning in those decisions. See 995 F.2d at 128-129.

a party, the award belongs to the party, not to the attorney representing the party." 910 F.2d at 513.

Every other court of appeals to have analyzed the language of Section 2412(d) in this context has concluded that EAJA awards are paid and belong to the prevailing party, not to that party's attorney. See pp. 16-17, *supra*. That conclusion is sound. EAJA says what it means and means what it says: Courts "shall award to a prevailing party" fees and other expenses under EAJA after that party shows, *inter alia*, that it is "eligible to receive an award under [EAJA]." 28 U.S.C. 2412(d)(1)(A) and (B). The court of appeals erred in self-consciously departing from that "literal interpretation of the EAJA." Pet. App. 3a.

II. EAJA AWARDS ARE SUBJECT TO ADMINISTRATIVE OFFSET UNDER 31 U.S.C. 3716 TO SATISFY DEBTS OWED TO THE UNITED STATES BY THE PREVAILING PARTY

Because the EAJA award in this case was payable to Kills Ree rather than to her attorney, that award, like most types of federal payments, was properly subject to an administrative offset under 31 U.S.C. 3716 to collect a pre-existing debt that Kills Ree owed to the United States.

Congress revised and expanded Section 3716's offset authority when it enacted the Debt Collection Improvement Act of 1996 (1996 Act), Pub. L. No. 104-134, § 31001, 110 Stat. 1321-358. The 1996 Act reflects Congress's effort "[t]o maximize collections of delinquent debts owed to the Government by ensuring quick action to enforce recovery of debts and the use of all appropriate collection tools." *Id.* § 31001(b)(1), 110 Stat. 1321-358. The 1996 Act requires all federal agencies to use

the administrative offset authority in Section 3716 when debts to the United States are more than 180 days delinquent, see 31 U.S.C. 3716(c)(1)(A) and (6), and it broadly defines the class of "debts" that are subject to offset to include "any amount of funds or property that has been determined by an appropriate official of the Federal Government to be owed to the United States," 31 U.S.C. 3701(b)(1). See 1996 Act § 31001(d)(2)(D) and (z)(1)(B), 110 Stat. 1321-359 to 1321-361, 1321-378.[11]

All "funds payable by the United States" to an individual who owes a delinquent federal debt thus are subject to administrative offset, 31 U.S.C. 3701(a)(1), unless the payment is exempted by statute. See 31 C.F.R. 285.5(e)(1); *Bryant*, 578 F.3d at 449; *Stephens*, 565 F.3d at 136, 140; *Reeves*, 526 F.3d at 738 n.3; *Manning*, 510 F.3d at 1255. Congress has exempted from mandatory offset several categories of payments, including Department of Education payments under Title IV of the Higher Education Act of 1965, see 31 U.S.C. 3716(c)(1)(C); certain federal benefit payments (including Social Security benefits) to the extent the payments total less than $9000 annually, 31 U.S.C. 3716(c)(3)(A); and other payments when a statute "explicitly prohibits using administrative offset or setoff," 31 U.S.C.

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[11] The United States also retains a non-statutory, common-law right to reduce payments by offset for debts owed to it by payees. See *United States* v. *Munsey Trust Co.*, 332 U.S. 234, 239 (1947) ("The government has the same right 'which belongs to every creditor, to apply the unappropriated moneys of his debtor, in his hands, in extinguishment of the debts due to him.'") (citation omitted); 31 U.S.C. 3716(d) ("Nothing in this section is intended to prohibit the use of any other administrative offset authority existing under statute or common law."); cf. *Citizens Bank* v. *Strumpf*, 516 U.S. 16, 18 (1995) (discussing offset). That common-law authority is not at issue in this case.

3716(e)(2). See 31 C.F.R. 285.5(e)(2).[12] No such exemption applies to attorney fees awarded under EAJA. 31 C.F.R. 285.5(e)(1) (Except as specifically provided, "all federal payments" including "fees" paid by federal agencies "are eligible for offset."); see also *Bryant*, 578 F.3d at 449; *Stephens*, 565 F.3d at 136; *Manning*, 510 F.3d at 1255.

Indeed, the court of appeals did not dispute that EAJA awards are subject to administrative offset to satisfy debts owed to the government by the proper payees. The court's disapproval of the offset in this case was based on its view that EAJA fees "cannot be used to offset the parties' debts to the government" because such fees "are awarded to the prevailing parties' attorneys, rather than to the parties themselves." Pet. App. 1a-2a. For the reasons set forth above (pp. 13-30, *supra*), that analysis cannot be reconciled with the text and history of EAJA, or with this Court's decisions construing similar fee-shifting statutes. Because the award of fees and other expenses in this case was payable to Kills Ree herself under the plain terms of EAJA, the government properly utilized the administrative-offset mechanism to apply that award to Kills Ree's pre-existing debt to the United States.

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[12] In addition, the Secretary of the Treasury must exempt from offset payments made under means-tested programs for which the head of the responsible agency has requested an exemption, 31 U.S.C. 3716(e)(3)(B); 31 C.F.R. 285.5(e)(7)(i), and the Secretary has discretion to exempt from offset certain other payments for which the relevant agency head has made a request, 31 U.S.C. 3716(e)(3)(B); 31 C.F.R. 285.5(e)(7)(ii). No agency head has requested that EAJA awards be exempted from offset, and the Secretary of the Treasury has not exempted them.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

1. 28 U.S.C. 2412 provides in pertinent part:

Costs and fees

(a)(1) Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title, but not including the fees and expenses of attorneys, may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. A judgment for costs when taxed against the United States shall, in an amount established by statute, court rule, or order, be limited to reimbursing in whole or in part the prevailing party for the costs incurred by such party in the litigation.

* * * * *

(b) Unless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys, in addition to the costs which may be awarded pursuant to subsection (a), to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award.

* * * * *

(d)(1)(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

(B) A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an itemized statement from any attorney or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed. The party shall also allege that the position of the United States was not substantially justified. Whether or not the position of the United States was substantially justified shall be determined on the basis of the record (including the record with respect to the action or failure to act by the agency upon which the civil action is based) which is made in the civil action for which fees and other expenses are sought.

* * * * *

(2) For the purposes of this subsection—

(A) "fees and other expenses" includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the court to be necessary for the preparation of the party's case, and reasonable attorney fees (The amount of fees awarded under this subsection shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the United States; and (ii) attorney fees shall not be awarded in excess of $125 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.);

(B) "party" means (i) an individual whose net worth did not exceed $2,000,000 at the time the civil action was filed, or (ii) any owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization, the net worth of which did not exceed $7,000,000 at the time the civil action was filed, and which had not more than 500 employees at the time the civil action was filed; except that an organization described in section 501(c)(3) of the Internal Revenue Code of 1986 (26 U.S.C. 501(c)(3)) exempt from taxation under section 501(a) of such Code, or a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)), may be a party regardless of the net worth of such organiza-

tion or cooperative association or for purposes of subsection (d)(1)(D), a small entity as defined in section 601 of title 5;

* * * * *

(H) "prevailing party", in the case of eminent domain proceedings, means a party who obtains a final judgment (other than by settlement), exclusive of interest, the amount of which is at least as close to the highest valuation of the property involved that is attested to at trial on behalf of the property owner as it is to the highest valuation of the property involved that is attested to at trial on behalf of the Government; and

* * * * *

2. Section 206(b) of the Equal Access to Justice Act, as added by the Act of Aug. 5, 1985, Pub. L. No. 99-80, § 3(2), 99 Stat. 186, provides:

Section 206(b) of the Social Security Act (42 U.S.C. 406(b)(1)) shall not prevent an award of fees and other expenses under section 2412(d) of title 28, United States Code. Section 206(b)(2) of the Social Security Act shall not apply with respect to any such award but only if, where the claimant's attorney receives fees for the same work under both section 206(b) of that Act and section 2412(d) of title 28, United States Code, the claimant's attorney refunds to the claimant the amount of the smaller fee.

3. Section 206 of the Social Security Act, as codified at 42 U.S.C. 406, provides in pertinent part:

Representation of claimants before Commissioner

* * * * *

(b) Fees for representation before court

(1)(A) Whenever a court renders a judgment favorable to a claimant under this subchapter who was represented before the court by an attorney, the court may determine and allow as part of its judgment a reasonable fee for such representation, not in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment, and the Commissioner of Social Security may, notwithstanding the provisions of section 405(i) of this title, but subject to subsection (d) of this section, certify the amount of such fee for payment to such attorney out of, and not in addition to, the amount of such past-due benefits. In case of any such judgment, no other fee may be payable or certified for payment for such representation except as provided in this paragraph.

* * * * *

(2) Any attorney who charges, demands, receives, or collects for services rendered in connection with proceedings before a court to which paragraph (1) of this subsection is applicable any amount in excess of that allowed by the court thereunder shall be guilty of a misdemeanor and upon conviction thereof shall be subject to a fine of not more than $500, or imprisonment for not more than one year, or both.

* * * * *

(d) Assessment on attorneys

(1) In general

Whenever a fee for services is required to be certified for payment to an attorney from a claimant's past-due benefits pursuant to subsection (a)(4) or (b)(1) of this section, the Commissioner shall impose on the attorney an assessment calculated in accordance with paragraph (2).

(2) Amount

(A) The amount of an assessment under paragraph (1) shall be equal to the product obtained by multiplying the amount of the representative's fee that would be required to be so certified by subsection (a)(4) or (b)(1) of this section before the application of this subsection, by the percentage specified in subparagraph (B), except that the maximum amount of the assessment may not exceed the greater of $75 or the adjusted amount as provided pursuant to the following two sentences. * * * *

(B) The percentage specified in this subparagraph is—

* * * * *

(ii) for calendar years after 2000, such percentage rate as the Commissioner determines is necessary in order to achieve full recovery of the costs of determining and certifying fees to attorneys from the past-due benefits of claimants, but not in excess of 6.3 percent.

* * * * *

4. 31 U.S.C. 3701 provides in pertinent part:

Definitions and application

(a) In this chapter—

(1) "administrative offset" means withholding funds payable by the United States (including funds payable by the United States on behalf of a State government) to, or held by the United States for, a person to satisfy a claim.

* * * * *

(b)(1) In subchapter II of this chapter and subsection (a)(8) of this section, the term "claim" or "debt" means any amount of funds or property that has been determined by an appropriate official of the Federal Government to be owed to the United States by a person, organization, or entity other than another Federal agency. A claim includes, without limitation—

(A) funds owed on account of loans made, insured, or guaranteed by the Government, including any deficiency or any difference between the price obtained by the Government in the sale of a property and the amount owed to the Government on a mortgage on the property,

(B) expenditures of nonappropriated funds, including actual and administrative costs related to shoplifting, theft detection, and theft prevention,

(C) over-payments, including payments disallowed by audits performed by the Inspector General of the agency administering the program,

(D) any amount the United States is authorized by statute to collect for the benefit of any person,

(E) the unpaid share of any non-Federal partner in a program involving a Federal payment and a matching, or cost-sharing, payment by the non-Federal partner,

(F) any fines or penalties assessed by an agency; and

(G) other amounts of money or property owed to the Government.

* * * * *

(d) Sections 3711(e) and 3716–3719 of this title do not apply to a claim or debt under, or to an amount payable under—

(1) the Internal Revenue Code of 1986 (26 U.S.C. 1 et seq.),

(2) the Social Security Act (42 U.S.C. 301 et seq.), except to the extent provided under sections 204(f) and 1631(b)(4) of such Act and section 3716(c) of this title, or

(3) the tariff laws of the United States.

(e) In section 3716 of this title—

(1) "creditor agency" means any agency owed a claim that seeks to collect that claim through administrative offset; and

(2) "payment certifying agency" means any agency that has transmitted a voucher to a disbursing official for disbursement.

* * * * *

5. 31 U.S.C. 3716 provides in pertinent part:

Administrative offset

(a) After trying to collect a claim from a person under section 3711(a) of this title, the head of an executive, judicial, or legislative agency may collect the claim by administrative offset. The head of the agency may collect by administrative offset only after giving the debtor—

(1) written notice of the type and amount of the claim, the intention of the head of the agency to collect the claim by administrative offset, and an explanation of the rights of the debtor under this section;

(2) an opportunity to inspect and copy the records of the agency related to the claim;

(3) an opportunity for a review within the agency of the decision of the agency related to the claim; and

(4) an opportunity to make a written agreement with the head of the agency to repay the amount of the claim.

(b) Before collecting a claim by administrative offset, the head of an executive, judicial, or legislative agency must either—

(1) adopt, without change, regulations on collecting by administrative offset promulgated by the Department of Justice, the Government Accountability Office, or the Department of the Treasury; or

(2) prescribe regulations on collecting by administrative offset consistent with the regulations referred to in paragraph (1).

(c)(1)(A) Except as otherwise provided in this subsection, a disbursing official of the Department of the Treasury, the Department of Defense, the United States Postal Service, or any other government corporation, or any disbursing official of the United States designated by the Secretary of the Treasury, shall offset at least annually the amount of a payment which a payment certifying agency has certified to the disbursing official for disbursement, by an amount equal to the amount of a claim which a creditor agency has certified to the Secretary of the Treasury pursuant to this subsection.

* * * * *

(C) Payments certified by the Department of Education under a program administered by the Secretary of Education under title IV of the Higher Education Act of 1965 shall not be subject to administrative offset under this subsection.

* * * * *

(3)(A)(i) Notwithstanding any other provision of law (including sections 207 and 1631(d)(1) of the Social Security Act (42 U.S.C. 407 and 1383(d)(1)), section 413(b) of Public Law 91-173 (30 U.S.C. 923(b)), and section 14 of the Act of August 29, 1935 (45 U.S.C. 231m)), except as provided in clause (ii), all payments due to an individual under—

(I) the Social Security Act,

(II) part B of the Black Lung Benefits Act, or

(III) any law administered by the Railroad Retirement Board (other than payments

that such Board determines to be tier 2 benefits),

shall be subject to offset under this section.

(ii) An amount of $9,000 which a debtor may receive under Federal benefit programs cited under clause (i) within a 12-month period shall be exempt from offset under this subsection.

* * * *

(B) The Secretary of the Treasury shall exempt from administrative offset under this subsection payments under means-tested programs when requested by the head of the respective agency. The Secretary may exempt other payments from administrative offset under this subsection upon the written request of the head of a payment certifying agency. A written request for exemption of other payments must provide justification for the exemption under standards prescribed by the Secretary. Such standards shall give due consideration to whether administrative offset would tend to interfere substantially with or defeat the purposes of the payment certifying agency's program. The Secretary shall report to the Congress annually on exemptions granted under this section.

* * * * *

(6) Any Federal agency that is owed by a person a past due, legally enforceable nontax debt that is over 180 days delinquent, including nontax debt administered by a third party acting as an agent for the Federal Government, shall notify the Secretary of

the Treasury of all such nontax debts for purposes of administrative offset under this subsection.

(7)(A) The disbursing official conducting an administrative offset with respect to a payment to a payee shall notify the payee in writing of—

(i) the occurrence of the administrative offset to satisfy a past due legally enforceable debt, including a description of the type and amount of the payment otherwise payable to the payee against which the offset was executed;

(ii) the identity of the creditor agency requesting the offset; and

(iii) a contact point within the creditor agency that will handle concerns regarding the offset.

* * * * *

(d) Nothing in this section is intended to prohibit the use of any other administrative offset authority existing under statute or common law.

(c) This section does not apply—

* * * * *

(2) when a statute explicitly prohibits using administrative offset or setoff to collect the claim or type of claim involved.

* * * * *

6. 42 U.S.C. 1988 provides in pertinent part:

Proceedings in vindication of civil rights

* * * * *

(b) Attorney's fees

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92–318 [20 U.S.C. 1681 et seq.], the Religious Freedom Restoration Act of 1993 [42 U.S.C. 2000bb et seq.], the Religious Land Use and Institutionalized Persons Act of 2000 [42 U.S.C. 2000cc et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.], or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

* * * * *

RESPONDENT'S BRIEF

(5)

No. 08-1322

Supreme Court, U.S.
FILED
JAN 8 - 2009
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In The
Supreme Court of the United States

MICHAEL J. ASTRUE,
COMMISSIONER OF SOCIAL SECURITY,

Petitioner,

v.

CATHERINE G. RATLIFF,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

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QUESTION PRESENTED

Who is entitled to receive an attorney's fee awarded under the Equal Access to Justice Act in a Social Security disability case: the attorney who earned it through knowledge, skill, and industry, or her indigent client, who has not paid her attorney, and for whom the money would be a windfall?

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RELEVANT STATUTES

The relevant statutes are set out in the Appendix to this brief.

STATEMENT OF THE CASE

A. Facts and Proceedings Below

The Commissioner of Social Security found that Ruby Willow Kills Ree was entitled to Title XVI (Supplemental Security Income) disability benefits based on diabetes, arthritis, reactive airway disease, adjustment disorder with depressed mood, and borderline intellectual functioning.[1] Attorney Catherine Ratliff, a sole practitioner in Hot Springs, South Dakota, sued the Commissioner on Kills Ree's behalf, alleging that Kills Ree was entitled to additional benefits. The district court granted Kills Ree leave to proceed *in forma pauperis*.[2]

The district court ruled that Kills Ree was entitled to two months' additional benefits.[3] Under EAJA, Ratliff moved for an award of attorney's fees of $2,112.60 and South Dakota sales tax of $126.75, totaling $2,239.35. The Commissioner did not oppose

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[1] *Kills Ree v. Barnhart*, Civ. No. 04-5119 (D.S.D. Sept. 28, 2005). Ratliff has asked the Clerk for permission to lodge this decision, which is also cited in the government's brief.

[2] Eighth Circuit Joint Appendix at 21.

[3] *Kills Ree v. Barnhart*, *supra*, at 8-9.

the motion, and the district court entered judgment accordingly.[4] Two weeks later, the Department of the Treasury wrote Kills Ree that it had taken the entire $2,239.35 to apply to an unrelated debt that Kills Ree owed the federal government, leaving Ratliff with nothing.[5] Ratliff sued the Commissioner for her fee. The district court ruled against her.[6] The Eighth Circuit reversed.[7]

B. Social Security Cases and EAJA Fees

In Social Security cases, an attorney may lawfully receive a fee in only two ways. One is from the government under EAJA. The other is from the government out of the client's past-due benefits, either awarded by the court (which happens in only five percent of such cases) or after a remand. If past-due benefits are awarded, the Commissioner pays the attorney a fee of up to 25% of the past-due benefits, based on the fee contract between the attorney and the client.[8] In 1985, Congress specified in EAJA that

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[4] Pet. App. 23a.

[5] *Id.* at 21a-22a.

[6] *Id.* at 10a-16a.

[7] *Id.* at 1a-9a, reported at 540 F.3d 800 (2008).

[8] The controlling statutes are EAJA (28 U.S.C. 2412), the Social Security Title II fee provisions (42 U.S.C. 406(b)(1)(A) and (b)(2)), and the Social Security Title XVI fee provisions (42 U.S.C. 1383(d)(2)(A)), all of which are reprinted in the Appendix to this brief. The Social Security Administration's data showing that only five percent of court cases resulted in an award of benefits during fiscal year 2007 are at http://waysandmeans.

(Continued on following page)

if "the claimant's attorney receives fees" for the same work under EAJA and from the client's past-due benefits, the attorney must refund the smaller fee to the claimant.[9] In 2005, Congress extended the direct payment system for Title II fees to Title XVI Social Security cases such as this one.[10]

Titles II and XVI use the same definition of "disability."[11] Title II requires that the claimant have worked enough to become "insured"; Title XVI requires that the claimant be poor. As this Court has

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house.gov/media/pdf/111/ssgb.pdf (last visited January 4, 2010) at 1-80.

If a remand eventually results in an award of benefits by the agency, the attorney can return to federal court and request a fee award under the Social Security Act for services provided in federal court. *Bergen v. Commissioner*, 454 F.3d 1273, 1276-77 (11th Cir. 2006). (For cases handled before the agency, but not cases in federal court, under certain conditions, an attorney may obtain a deposit from a client into the attorney's trust account, subject to later approval by the Social Security Administration. Social Security Ruling 82-39, available at http://www.socialsecurity.gov/OP_Home/rulings/oasi/39/SSR82-39-oasi-39.html (last visited December 20, 2009)).

[9] Section 3 of the Act of August 5, 1985, Pub. L. No. 99-80, § 3, 99 Stat. 186, 28 U.S.C. 2412 note. *See also Gisbrecht v. Barnhart*, 535 U.S. 789, 796 (2002).

[10] Pub. L. No. 108-203, § 302(a)(1)(A), 118 Stat. 519 (2004). This law became effective on March 1, 2005, and sunsets on February 28, 2010. *Id.* § 302(c), 42 U.S.C. 1383 note; *see* 72 Fed. Reg. 44,766 (August 9, 2007). Until the enactment of this statute, courts had no authority to withhold past-due benefits to pay attorney's fees in Title XVI cases. *Bowen v. Galbreath*, 485 U.S. 74 (1988).

[11] *Barnhart v. Thomas*, 540 U.S. 20, 24 (2003).

noted, "Title II is an insurance program. . . . Title XVI is a welfare program."[12] Title XVI benefits are "designed to help aged, blind, and disabled people, who have little or no income." The program provides "cash to meet basic needs for food, clothing, and shelter."[13] A person with more than minimal income or assets is not eligible for Title XVI benefits.[14]

This Court noted in 1990 that EAJA fee awards in Social Security cases averaged less than $3,000.[15] EAJA fees remain modest. In fiscal year 2006, SSA paid 5,481 EAJA fee awards, in an average amount of $3,573.47.[16] More than 91% of the federal district court cases reported in 2008 involving EAJA were Social Security cases.[17]

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[12] *Bowen v. Galbreath*, 485 U.S. 74, 76 (1988).

[13] http://www.ssa.gov/ssi/index.htm (last visited December 20, 2009).

[14] http://www.ssa.gov/ssi/text-eligibility-ussi.htm and http://www.ssa.gov/ssi/text-resources-ussi.htm (last visited December 20, 2009).

[15] *Commissioner, INS v. Jean*, 496 U.S. 154, 164 n.12 (1990).

[16] Declaration of Candace Wienckowski, Fiscal Management Analyst, Social Security Administration, *Williams v. Astrue*, No. 06-0427-SAC (D. Kan.) (document 28-2, filed December 4, 2007).

[17] A LEXIS search on November 14, 2009, showed 902 reported district court cases in 2008 that used the terms "EAJA" or "Equal Access to Justice Act." Of these 902 cases, 19 were the same case reported more than once, so there were 883 different cases. Of these 883 cases, an EAJA motion was made in 646; of these 646, 593 (91.8%) were Social Security cases.

In addition, about 2,400 EAJA fee awards were made in the two most recent fiscal years by the United States Court of Appeals for Veterans Claims.[18] The law governing attorney's fees in veteran-benefit cases parallels the law governing attorney's fees in Social Security cases. Attorneys handling veterans' claims in administrative or court proceedings are limited to a contingent fee of 20% of past-due benefits, which is paid directly to the attorney.[19] And if an attorney in a veterans' case "receives fees" under both a contingent fee agreement and EAJA, the attorney must pay the claimant the amount of the smaller fee.[20]

SUMMARY OF THE ARGUMENT

The plain meaning of "attorney's fee" is a fee for an attorney. But the Commissioner says that an "attorney's fee" awarded under EAJA should be paid to the attorney's *client*, even though the client has not paid the attorney. Here, the government took an attorney's fee awarded under EAJA in a Social Security disability case to pay a client's unrelated debt, leaving the attorney with no fee. The

[18] http://www.uscourts.cavc.gov/documents/Annual_Report_FY_2009_October_1_2008_to_September_30_2009.pdf (last visited December 20, 2009).

[19] 38 U.S.C. 5904(d).

[20] Pub. L. No. 102-572, § 506(c), 106 Stat. 4513 (1992), 28 U.S.C. 2412 note ("Fee Agreements").

government received a windfall—an "economic gain[ ] independent of work, planning, or other productive activities that society wishes to reward"[21]—by not having to pay the attorney's fee it owed. The client received a windfall because her unrelated debt was reduced. The Commissioner justifies these windfalls because, he argues, the client's right to seek an "award" of fees means that the client also has the right to receive the attorney's fee.

But the right to seek an "award" of fees and the right to receive the fees are different. This point is demonstrated by the language Congress used in enacting EAJA in 1980, which had a judicially settled meaning: attorney's fees awarded by a court should be paid to an attorney if necessary to avoid offset of the attorney's fee by the client's creditor or a windfall to the client.

The point is proven again by the language Congress used in amending EAJA in 1985 to specify that an EAJA fee award may be made in a Social Security case. There, Congress recognized that statutory fees are paid to attorneys by providing that where "the claimant's attorney *receives fees*" for the same work under EAJA and the Social Security Act, the attorney must refund the amount of the smaller fee to the claimant (emphasis added). The legislative history of the 1985 amendments to EAJA reinforces the plain language of the statute by confirming that

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[21] Eric Kades, *Windfalls*, 108 Yale L.J. 1489, 1491 (1999).

the amendments "*permi[t] the attorney to seek recovery* under both" EAJA and the Social Security Act, and that the attorney may "*keep* the larger fee. . . ."[22] Thus, "*an attorney collecting attorney fees under the EAJA* would have to use such fees to reduce" any fee withheld from the claimant's benefits under § 406(b).[23]

Congress used "award" as a noun in its 1985 amendments extending EAJA to Social Security cases, where it specified that the Social Security Act "shall not prevent an award of fees" and "shall not apply with respect to any such award" if certain conditions are met. When used as a noun in the context of law, an "award" means a "decision."[24] So the client receives the "award"—the decision awarding the fee—but the attorney receives the fee, the "payment asked or given for professional services."[25]

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[22] H.R. Rep. No. 99-120 at 20 (1985) (emphasis added).

[23] *Id.* at 19 (emphasis added).

[24] *Webster's New World Dictionary* 97 (2d College Edition 1978). Similar definitions abound. *American Heritage Dictionary* 92 (1981) ("[a] decision, as one made by a judge or arbitrator"); *West's Legal Thesaurus/Dictionary* 77 (1986) ("[t]he decision of a body or entity"); *Black's Law Dictionary* 157 (9th ed. 2009) ("[a] final judgment or decision.").

[25] *Webster's New World Dictionary* 512 (2d College Edition 1978). *West's Legal Thesaurus/Dictionary* 318 (1986) defines "fee" as "payment for a service." *Black's Law Dictionary* 690 (9th ed. 2009) defines "fee" as "[a] charge for labor or services, esp. professional services."

Alternatively, even if an EAJA fee award were nominally payable to a Social Security claimant, the attorney would have a beneficial interest in the payment that would exempt it from offset. The attorney's fee is for the benefit of the attorney, and, if paid to the client, should be impressed with a trust in favor of the attorney. Such treatment of EAJA fees is consistent with traditional equitable principles, under which an implied or constructive trust arises "where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession."[26] And the government's regulations do not allow offset if a payment to a person is made "solely in that person's capacity as a representative payee for another person having the beneficial interest in the payment."[27]

After EAJA was enacted the Commissioner had to decide to whom to pay awards of attorney's fees. Until 2006, the Commissioner paid them to attorneys, but then reversed field by adopting his present theory, which apparently applies only to cases in which the plaintiff owes a debt to the government. (In cases in which the plaintiff does not owe the government a debt, the Commissioner apparently still pays attorney's fees to attorneys, if the client has assigned to the attorney the right to receive the fee.)

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[26] *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 213 (2002).

[27] 31 C.F.R. 285.5(e)(5).

The Commissioner's present theory is based on an erroneous reading of *Evans v. Jeff D.*, 475 U.S. 717 (1986), and *Venegas v. Mitchell*, 495 U.S. 82 (1990). But contrary to the Commissioner's reading of those cases, they do not speak to the question of who ultimately receives attorney's fees awarded by a court, and this Court has repeatedly said that attorney's fees awarded under fee-shifting statutes are paid to attorneys. These decisions are consistent with the common understanding that attorney's fees are paid to attorneys, not to their clients.

The Commissioner conjures up a host of theoretical problems with paying attorney's fees, expenses, and costs to attorneys. But he does not cite even one case of such a problem actually occurring in the 30 years since EAJA was enacted. The absence of any such cases demonstrates that the Commissioner's concerns are groundless. Worse, the Commissioner's proposal—that fees, expenses, and costs awarded under EAJA should be paid to the client, where the client has not paid or advanced them—would create genuine practical problems. If paid to Social Security claimants, many attorney's fee and costs checks will not reach the attorney.

The Commissioner's approach is not, as the government argues, necessary to avoid disputes over who should receive payment of fees and costs. Existing attorney ethics rules in every state strictly regulate how attorneys handle funds, including payments of attorney's fees, expenses, and costs, if more than one person may have an interest in them. Attorneys who

violate these rules are subject to significant punishment, even disbarment. The rules work well. But the Commissioner's approach would displace these state rules, by paying awards of fees, expenses, and costs to clients (and thereby permitting the government to take them to pay the clients' debts to it), no matter who should receive them. There is no evidence that Congress intended the extraordinary result of federalizing this area traditionally reserved to state law.

Finally, the Commissioner's theory would subvert not only EAJA but most other fee-shifting statutes as well, because most such statutes use language similar to EAJA's "award to a prevailing party" standard. Most conspicuously, 42 U.S.C. 1988, which provides that a court may "allow the prevailing party" a fee in a civil rights case, would be sabotaged. Attorneys in those cases would no longer know whether any fees they might earn would be taken by their client's creditors or spent by their client. The purpose of fee-shifting statutes is to motivate attorneys to take appropriate cases by paying their fees and reimbursing any expenses and costs they have advanced if they win. Attorneys are much less likely to take such cases if when they win they are not paid and are not even reimbursed for the costs they advanced.

ARGUMENT

I. The text of EAJA contemplates that attorney's fees in Social Security cases will be received by attorneys.

A. Section 3 of the 1985 amendments to EAJA distinguishes between an "award" of attorney's fees and the attorney's right to "receive" the fees.

According to the Commissioner, an EAJA attorney's fee in a Social Security case, earned by the attorney, should be paid to the attorney's indigent client and may be taken to pay the client's debt to the government, even though the client has not paid the attorney. This strange result is supposedly required by EAJA's provision that "a court shall *award to a prevailing party* other than the United States *fees and other expenses* . . . incurred by that party in any civil action. . . ."[28] To be sure, the "prevailing party" is the client, not the attorney. *Evans v. Jeff D.*, 475 U.S. 717, 730 (1986). But the text of § 3 of the 1985 amendments to EAJA expressly incorporates a critical distinction that courts have long recognized: the distinction between the right to an "award" of fees, and the right to "receive[ ]" the fees. This distinction is necessary to avoid a windfall to the client (who under the Commissioner's theory would have her debt to the government reduced) and to the government (which would retain the funds it otherwise

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[28] 28 U.S.C. 2412(d)(1)(A) (emphasis added).

would have paid to the attorney) at the expense of the attorney (who earned the fee but would not receive it).

Section 3 of the 1985 EAJA amendments provides:

> Section 206(b) of the Social Security Act (42 U.S.C. 406(b)(1)) shall not prevent an *award* of fees and other expenses under section 2412(d) of title 28, United States Code. Section 206(b)(2) of the Social Security Act shall not apply with respect to any such *award* but only if, where *the claimant's attorney receives fees* for the same work under both section 206(b) of that Act and section 2412(d) of title 28, United States Code [EAJA], the claimant's attorney refunds to the claimant the amount of the smaller fee.[29]

The Commissioner's argument that Congress equated the right to an "award" of fees under EAJA with the right to "receive[ ] fees" is foreclosed by the language of the statute, which expressly distinguishes between the two. The only reading that gives meaning to all the words of the statute is that while the client may apply for an "award" of EAJA fees (that is, a decision that fees are due[30]), the attorney is entitled to

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[29] Act of August 5, 1985, Pub. L. No. 99-80, § 3, 99 Stat. 186, 28 U.S.C. 2412 note (emphasis added).

[30] *See* P. 7, *supra*, P. 15-16, *infra*.

"receive" the EAJA fees, and the attorney keeps the larger of the EAJA fee or the § 406(b) fee (if any).

According to the Commissioner, the purpose of § 3 is to avoid the prohibition on an attorney receiving a fee in a Social Security case other than under section § 406(b).[31] Although this is indeed *one* purpose of § 3, the other purpose is to be sure that the attorney does not *keep* both fees. This point had to be addressed because Congress understood that attorney's fees are paid to attorneys.

The Commissioner argues that the refund provisions of § 3 apply only if the attorney, after not receiving the EAJA fee, happens to come into possession of it. This unlikely scenario has the client receiving the EAJA fee, then giving it to the attorney, who then shuffles it back to the client if it is less than the § 406(b) fee. There is no evidence that Congress contemplated EAJA fee checks being shuffled back and forth between attorneys and clients.

Had Congress intended that EAJA attorney's fees be paid initially to Social Security claimants, Congress would have provided that if (and only if) the EAJA fee exceeds the § 406(b) fee, the *claimant* must pay the excess to the attorney, instead of providing that the *attorney* must pay the smaller fee to the claimant. That Congress instead intended both fees to be paid to the attorney in the first instance is

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[31] Pet. Br. at 26 n.8.

confirmed because the statute requires that the attorney *refund* the smaller fee to the client, rather than requiring that the attorney may *collect* only the amount by which the EAJA fee exceeds the § 406(b) fee. That § 3 uses the term "refund" in the general sense of "pay," rather than in the sense of "[t]he return of money to a person who overpaid,"[32] is evident because the statute requires the attorney to "refund" the amount of whichever fee is smaller, the § 406(b) fee or the EAJA fee. Because the § 406(b) fee is *never* paid initially to the client, the amount of it could never be literally "returned" to the client.

Congress understandably chose the practical and reliable method of routing both fees through the attorney, who is bound by universal state bar ethics rules to distribute the money appropriately. The alternative method—attempting to route attorney's fees through clients who often are destitute—would be highly unreliable. An EAJA fee is typically awarded when a case is remanded from federal court to the agency. *Shalala v. Schaefer*, 509 U.S. 292, 297-99 (1993) (court should enter judgment terminating case when it remands under sentence four of 42 U.S.C. 405(g), which applies in most cases). About 46% of Social Security cases result in a remand for further proceedings, but only 5% result in an award of benefits by the court.[33] On average the agency

[32] *Black's Law Dictionary* 1394 (9th ed. 2009).

[33] http://waysandmeans.house.gov/media/pdf/111/ssgb.pdf (last visited January 4, 2010) at 1-80.

takes 369 days to process a court remand.[34] So in the large majority of cases (46% to 5%), an EAJA fee awarded when the case is remanded precedes, by about a year, the agency's decision whether it will award benefits, which determines whether there will be a § 406(b) fee. Congress did not intend needy clients to safeguard an EAJA fee for a year while waiting to find out whether they will receive benefits—and if so, whether the EAJA fee will exceed the § 406(b) fee.

The Commissioner cites 28 U.S.C. 2412(d)(1)(B), which requires a party seeking an EAJA award to show that the party is eligible "to receive an award." But "award," when used in legal contexts as a noun (as in "to receive an award") means "decision."[35] Only the prevailing party may receive the *award* (the decision granting fees), but only the attorney who earned the *fee* (the "payment asked or given for professional services"[36]) is entitled to receive it.

EAJA, as enacted in 1980, uses "award" or "awarded" 29 times: 14 times as a noun, 5 times as a past participle, 5 times as an intransitive verb, 3 times as a transitive verb, and twice as a gerund. The

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[34] Social Security Administration, Office of the Inspector General, Hearing Office Remand Processing Audit Report A-12-08-28036, September, 2008, at 5, available at http://www.socialsecurity.gov/oig/ADOBEPDF/A-12-08-28036.pdf (last visited December 20, 2009).

[35] P. 7, *supra*.

[36] *Id.*

Commissioner's brief cites only the definition of the transitive verb.[37] But § 3 of the 1985 amendments uses "award" *only* as a noun ("an award of fees and other expenses" and "with respect to any such award"). So in § 3, as in § 2412(d)(1)(B), the meaning of "award" is "decision." A prevailing party receives an "award"—a "decision"—granting attorney's fees, but the attorney who earned the "fees"—"the payment asked or given for professional services"[38]—receives them. Consistent with EAJA's use of the noun "award," meaning "decision," its use of "award" as a transitive verb (as in 28 U.S.C. 2412(d)(1)(A), "a court shall award to a prevailing party") is most sensibly read to mean that the court shall "give a decision" to a prevailing party.[39]

Any reading of the statute that entitles a client to receive the attorney's fee—and thereby allows the client to spend it, or the government to take the fee rather than pay it to the attorney—defies common sense that attorney's fees are paid to attorneys, not their clients. And in a Social Security case, the

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[37] Pet. Br. at 10 and 15.

[38] P. 7, *supra*.

[39] *Webster's New World Dictionary* 97 (2d College Edition 1978) (award used as transitive verb means "to give by the decision of a law court or arbitrator"). Other dictionaries agree. *American Heritage Dictionary* 92 (1981) ("to grant as merited or due" or "to declare as legally due"); *West's Legal Thesaurus/Dictionary* 77 (1986) ("to grant; to adjudge"); *Black's Law Dictionary* 157 (9th ed. 2009) ("to grant by formal process or by judicial decree.").

attorney has *never* been paid by the client, because such payment is unlawful. As this Court has recognized, "[t]he prescriptions set out in §§ 406(a) and (b) establish the exclusive regime for obtaining fees for successful representation of Social Security benefits claimants. Collecting or even demanding from the client anything more than the authorized allocation of past-due benefits is a criminal offense."[10] Thus, in no Social Security case will an EAJA fee award reimburse the client for fees the client previously paid the attorney, because all fees are paid by the government—both the EAJA fees that come from the government's funds and the § 406 fees that come from the client's past-due benefits.

Finally, the Commissioner points to EAJA's language limiting an award to fees and expenses "incurred by that party" (28 U.S.C. 2412(d)(1)(A)) and argues that this demonstrates Congress's intent that EAJA fee awards be received by prevailing parties, not their attorneys. But § 3 shows that an EAJA fee may exceed the contractual 25% fee allowed under the Social Security Act, so the fee "incurred by" the plaintiff is not limited to the contractual fee. Nor can "incurred by" mean that the client has already paid the attorney because, as explained above, an attorney may not demand such a payment in a Social Security case.

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[10] *Gisbrecht v. Barnhart*, 535 U.S. 789, 795-96 (2002).

At least in the Social Security setting, the only way to make sense of EAJA's "incurred by" language and give effect to all its terms is to read it as the Federal Circuit and Ninth Circuit have, construing "incurred by" to include an obligation for fees that is contingent on an award of fees.[41] In other words, the fees are incurred in the sense that the attorney has performed the work in the expectation of receiving a fee if a fee is awarded under EAJA. Under this reading of the statute, the language "incurred by" supports the attorney's entitlement to receive the EAJA fee, rather than allowing the government to take it to pay the client's unrelated debt or allowing the client to receive it and use it for other purposes.

The Commissioner, as of 2009, agreed with this reading of the statute. He advised a district court that had inquired about his reading of the "incurred by" language that "an award of attorney's fees under EAJA is not necessarily contingent upon an obligation to pay counsel and the presence of an attorney-client relationship is sufficient to entitle the prevailing party to receive a fee award."[42] The Commissioner described this as the "current policy of the Social Security Administration."[43] Later, when the

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[41] *Ed A. Wilson, Inc. v. General Services Admin.*, 126 F.3d 1406, 1408-10 (Fed. Cir. 1997); *Morrison v. Commissioner of Internal Revenue*, 565 F.3d 658, 662-63 (9th Cir. 2009).

[42] *Vinning v. Astrue*, No. 4:08-CV-059-A, 2009 U.S. Dist. Lexis 100896, at *7-8 (N.D. Tex. October 29, 2009).

[43] *Id.*

same district court ordered him to provide more information, he told the court that his "litigation position" on this issue was "currently under review" by "high-ranking DOJ officials, possibly including the Solicitor General"[44] (possibly as a result of this case).

B. "Attorney's fees" means fees payable to attorneys.

EAJA expressly provides for "attorney fees."[45] This Court's most recent EAJA case, *Richlin Security Service Co. v. Chertoff*, looks to "the traditional meaning of the term 'attorney's fees.'"[46] The traditional meaning of the term "attorney's fees" is fees charged by or paid to an attorney for the attorney's services. "[T]he term [a 'reasonable attorney's fee'] must refer to a reasonable fee for the work product of an attorney." *Missouri v. Jenkins*, 491 U.S. 274, 285 (1989).

Consistent with the traditional meaning "attorney's fees," this Court has repeatedly recognized that attorney's fees awarded pursuant to fee-shifting statutes are paid to attorneys:

- "Where a plaintiff has obtained excellent results, *his attorney should recover a fully*

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[44] *Id.* at **12.

[45] 28 U.S.C. 2412(d)(2)(A)(ii).

[46] ___ U.S. ___, 128 S.Ct. 2007, 2015 (2008).

compensatory fee." *Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983) (emphasis added).

- "In determining the amount of fees to be awarded, it is not legally relevant that plaintiffs' counsel . . . are employed by . . . a privately funded non-profit public interest law firm. It is in the interest of the public that *such law firms be awarded reasonable attorneys' fees* to be computed in the traditional manner when its counsel perform legal services otherwise entitling them to the award of attorneys' fees." *Blum v. Stenson*, 465 U.S. 886, 895 (1984) (quoting *Davis v. County of Los Angeles*, 8 E.P.D. ¶ 9444 (C.D. Cal. 1974) (emphasis added) (ellipses in original)).

- "[A]ny award of costs or fees would inure to the benefit of Idaho Legal Aid." *Evans v. Jeff D.*, 475 U.S. 717, 721 n.2 (1986).

- "[I]f plaintiffs . . . find it possible to engage a lawyer based on the statutory assurance that *he will be paid* a 'reasonable fee,' the purpose behind the fee-shifting statute has been satisfied." *Pennsylvania v. Delaware Valley Citizens' Council*, 478 U.S. 546, 565 (1986) (*Delaware Valley I*) (emphasis added).

- "The issue before us is whether, when a plaintiff prevails, *its attorney should or may be awarded separate compensation* for assuming the risk of not being paid." *Pennsylvania v. Delaware Valley Citizens' Council*, 483 U.S. 711, 715 (1987) (*Delaware Valley II*) (emphasis added).

- "As we understand § 1988's provision for allowing a 'reasonable attorney's fee,' *it contemplates reasonable compensation*, in light of all the circumstances, *for the time and effort expended by the attorney* for the prevailing plaintiff, no more and no less." *Blanchard v. Bergeron*, 489 U.S. 87, 93 (1989) (emphasis added).

- "We . . . take as our starting point the self-evident proposition that the 'reasonable attorney's fee' provided for by statute should compensate the work of . . . attorneys." *Missouri v. Jenkins*, 491 U.S. 274, 285 (1989).

- "Although the claimants were named as the appellants below, and are named as petitioners here, *the real parties in interest are their attorneys, who seek to obtain higher fee awards. . . .*" *Gisbrecht v. Barnhart*, 535 U.S. 789, 798 n.6 (2002) (emphasis added).

- "Banks brought his claims under federal statutes that authorize *fee awards to prevailing plaintiffs' attorneys.*" *Commissioner of Internal Revenue v. Banks*, 543 U.S. 426, 438 (2005) (emphasis added).

Further, EAJA provides that "attorney fees shall not be awarded in excess of $125 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved,

justifies a higher fee."[47] This provision makes sense only if attorney's fees are paid to attorneys. Congress need not have made an exception to the $125 per hour rate when "the limited availability of qualified attorneys . . . justifies a higher fee" unless the fee was for the attorney. A higher fee paid to the client, rather than to the attorney, would not achieve the purpose of attracting qualified attorneys.

As EAJA's provision for higher fees if qualified attorneys are in short supply illustrates, EAJA seeks to achieve its aims through market mechanisms. Likewise, EAJA measures attorney's fees based on the marketplace. 28 U.S.C. 2412(d)(2)(A) ("prevailing market rates" are used to determine fees). *See Richlin Security Service Co. v. Chertoff*, ___ U.S. ___, 128 S.Ct. 2007, 2013 (2008) (under EAJA, paralegal fees, like all other fees, are measured by "prevailing market rates"). In the marketplace, clients pay fees to attorneys, not vice-versa. EAJA simply shifts to the government the responsibility for paying the attorney's fee.

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[47] 28 U.S.C. 2412(d)(2)(A)(ii).

C. In EAJA, Congress used language with a judicially settled meaning: that an attorney's fee should be paid directly to an attorney if necessary to avoid a windfall to a client or offset by the client's creditor.

When Congress uses terms defined in existing law, it is presumed to intend the same meaning for those terms: "[W]hen judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its judicial interpretations as well." *Rowe v. N. H. Motor Transp. Ass'n*, 552 U.S. 364, ___, 128 S.Ct. 989, 994 (2008), quoting *Merrill Lynch v. Dabit*, 547 U.S. 71, 85 (2006). This Court has applied this principle to fee-shifting statutes by construing 42 U.S.C. 1988 in light of the statutes and case law preceding the statute's enactment. *Blum v. Stenson*, 465 U.S. 886, 894 n.10 (1984) ("Congress was legislating in light of experience when it enacted the 1976 fee statute"); *Hensley v. Eckerhart*, 461 U.S. 424, 433 n.7 (1983) (Congress patterned § 1988 on the attorney's fee provisions of the Civil Rights Act of 1964). The language Congress used in EAJA in 1980 and 1985—"award to a prevailing party"—had a settled judicial meaning, established in a series of cases predating EAJA: it authorized payment of an attorney's fee directly to the attorney if necessary to pay the attorney and avoid a windfall to the client, or, as in this case, to prevent the client's creditor from offsetting the attorney's fee.

The Fifth Circuit in 1970, in a case in which the fee-shifting statute provided that the court "may allow the prevailing party . . . a reasonable attorney's fee," ruled that "the fees allowed are to reimburse and compensate for legal services rendered and will not go to the litigants, named or class."[48] Similarly, the Seventh Circuit in 1975, in a case in which the fee-shifting statute provided that the court "may grant as relief . . . reasonable attorney fees in the case of a prevailing plaintiff," ruled that "[t]o avoid any windfall, . . . the grant of fees should go directly to the organization providing the services," not to the plaintiff.[49] And the Third Circuit in 1977, in a case in which the fee-shifting statute provided that the court "shall . . . allow a reasonable attorney's fee to be paid by the defendant," ruled that "since the object of fee awards is not to provide a windfall to individual plaintiffs, fee awards must accrue to counsel."[50]

The Fifth Circuit in 1979, in a Truth in Lending Act case in which the fee-shifting statute provided that a creditor who violated a debtor's rights "is liable to that person" in an amount including "a reasonable attorney's fee," rejected a creditor's attempt to offset the attorney's-fee award against the plaintiff's debt. The court reasoned that "[t]o allow a setoff would in effect relieve the creditors in violation of the Act of

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[48] *Miller v. Amusement Enterprises, Inc.*, 426 F.2d 534, 539.

[49] *Hairston v. R & R Apartments*, 510 F.2d 1090, 1093.

[50] *Rodriguez v. Taylor*, 569 F.2d 1231, 1245.

the attorney's fee expense in the case of an insolvent debtor. Such a result would thwart the statute's individual enforcement scheme and its remedial objectives."[51] The court ruled that "the fee once awarded becomes in effect an asset of the attorney, not the client."[52] The court rejected the creditor's argument that the statute, by making the creditor liable "to that person [the debtor]" for "a reasonable attorney's fee," meant that the debtor must "be paid directly, and therefore that this payment is subject to setoff." The court ruled that "[s]uch an approach misstates the issue before the Court, places greater emphasis upon form than substance, and attaches to this phrase an unintended significance."[53]

Even in the absence of a fee-shifting statute, the Ninth Circuit in 1974 in a § 1983 case directed that court-awarded attorney's fees be paid to the attorney, not to a litigant who had not paid them: "Of course, the award should be made directly to the organization providing the services to ensure against a windfall to the litigant."[54]

Congress's understanding that attorney's fees should be paid to the attorney who earned them was also demonstrated in the legislative history of § 1988, which was enacted four years before EAJA and uses

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[51] *Plant v. Blazer Financial Services*, 598 F.2d 1357, 1366.

[52] *Id.*

[53] *Id.*

[54] *Brandenburger v. Thompson*, 494 F.2d 885, 889.

similar language. (Section 1988 says a court may "allow the prevailing party" a reasonable attorney's fee; EAJA says a court may "award to a prevailing party" a reasonable attorney's fee.) "In computing the fee, *counsel for prevailing parties should be paid*, as is traditional with attorneys compensated by a fee-paying client, for all time reasonably expended on a matter." S. Rep. No. 94-1011, at 6 (1976) (emphasis added) (internal quotation omitted). This Court has relied on this passage several times in construing § 1988.[55]

Ratliff has found no case before EAJA's enactment in 1980, or before EAJA's amendment and reenactment in 1985, holding that an attorney's fee awarded under a fee-shifting statute may be taken by a client's creditor or paid to a client who has not paid a fee. The Commissioner's argument—that the "award to a prevailing party" language of EAJA requires that an attorney's fee be paid to a client, or allows it to be taken by a client's creditor—contradicts the judicially settled meaning of that language at the time EAJA was enacted. The slight differences between the fee-shifting statutes in the pre-EAJA cases and EAJA do not justify a different result. Fee-shifting statutes that use similar language are interpreted similarly. *Independent Federation of*

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[55] *Blanchard v. Bergeron*, 489 U.S. 87, 91 (1989); *Riverside v. Rivera*, 477 U.S. 561, 575 (1986); and *Hensley v. Eckerhart*, 461 U.S. 424, 430 (1983).

Flight Attendants v. Zipes, 491 U.S. 754, 758 n.2 (1989).

The Commissioner's argument assumes that Congress intended a result at odds with existing law, but cites no evidence that Congress intended any such change. "In a case where the construction of legislative language such as this makes so sweeping and so relatively unorthodox a change as that made here, I think judges as well as detectives may take into consideration the fact that a watchdog did not bark in the night." *INS v. St. Cyr*, 533 U.S. 289, 320 n.44 (2001) (quoting *Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 602 (1980) (Rehnquist, J., dissenting)).

In re-enacting EAJA in 1985, Congress used the same "award to a prevailing party" language it used in originally enacting EAJA in 1980, and in § 3 amended the statute to integrate fee awards under EAJA and the Social Security Act, specifying that if the attorney "receives" fees under both statutes, the attorney refunds the amount of the smaller fee to the client. This is the *only* circumstance under EAJA in which the amount of a fee award in a Social Security case ultimately goes to a client. Indeed, § 3, and the later-added provision involving veterans' cases, are the only two provisions of EAJA that refer to clients receiving the amount of an attorney's fee under any circumstances. Section 3 demonstrates Congress's knowledge and approval that attorneys were receiving fees under EAJA, in accordance with the pre-EAJA cases construing language similar to the "award to a prevailing party" language that Congress

used in EAJA. The same understanding is reflected in Congress's later enactment of the parallel provision concerning EAJA fees in veterans' cases.[56]

D. The Commissioner paid EAJA attorney's fees to attorneys until 2006, and apparently continues to do so today if the plaintiff does not owe a debt to the government and assigns the right to receive the fees to the attorney.

As the Fourth Circuit noted in 2009, "Since the enactment of the EAJA in 1980, the Commissioner has consistently paid attorney's fees directly to the attorneys, not the claimants. In fact, the Commissioner created a direct deposit system for attorneys and issued I.R.S. 1099 forms directly to the attorneys who received awards, noting the awards as taxable attorney income."[57] As recently as 2006, the Commissioner argued that an EAJA fee was payable to the attorney.[58]

EAJA fee awards against the Commissioner are paid by the Commissioner. 28 U.S.C. 2412(d)(4). To effectuate the statute, the Commissioner had to

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[56] P. 5, *supra*.

[57] *Stephens v. Astrue*, 565 F.3d 131, 135 (4th Cir. 2009). The same observation is made in *Bryant v. Commissioner*, 578 F.3d 443, 446 (6th Cir. 2009).

[58] *Manning v. Astrue*, 510 F.3d 1246, 1255 (10th Cir. 2007), referencing *Manning v. Barnhart*, No. Civ-04-021-SPS (E.D. Okla.) (document 27, filed October 19, 2006).

decide who should receive the fees. The Commissioner decided that the attorney should receive them. The Commissioner's original understanding of EAJA is persuasive evidence of the proper interpretation of the statute. This Court gives "great weight to the contemporaneous interpretation of a challenged statute by an agency charged with its enforcement." *Bank of America Corp. v. United States*, 462 U.S. 122, 130 (1983). An agency charged with enforcing a law is unlikely to have ignored or overlooked "pervasive and open" practices that it believed violated the law. *Id.* It is even less likely to have violated the law itself.

The Commissioner tries to downplay the significance of his prior practice by observing that the offset program was not extended to attorney's-fee payments until January 2005,[59] but this is beside the point. The Commissioner paid EAJA fees to attorneys because the Commissioner believed that paying EAJA fees to attorneys was proper.

Even today, the Commissioner apparently continues to pay EAJA fees to attorneys if the client does not owe the government a debt and assigns to the attorney the right to receive the fees. The Commissioner will "waive strict compliance with the Anti-Assignment Act, 31 U.S.C. 3727 (which governs any transfer of an interest in monies owed by the United States and specifies the procedures necessary for creating a valid assignment), and forego arguing that

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[59] Pet. Br. at 4.

any EAJA fee awarded should be made payable to Plaintiff, rather than his attorney. . . ."[60] The Commissioner's practice of waiving the Anti-Assignment Act to allow payment of attorney's fees to attorneys reflects a sound recognition that the purpose of awarding attorney's fees is to compensate attorneys. That same recognition counsels against treating attorney's fees as property of the client available to pay the client's unrelated debts.

E. The direct payment provision of § 406(b) does not contradict EAJA.

The Commissioner argues that the direct payment provision of 42 U.S.C. 406(b) for contractual attorney's fees paid by the government out of a client's past-due benefits shows that Congress "knows what language to use to award attorney's fees to an attorney"[61] and that Congress's failure to use similar language in EAJA implies that Congress wanted attorney's fees to be paid to clients.[62]

There are four answers to the Commissioner's argument. First, as Eighth Circuit Judge Michael J.

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[60] *Patino v. Astrue*, No. S-05-1736 DAD, 2009 U.S. Dist. Lexis 45256, at *2-3 (E.D. Cal. May 18, 2009). The Commissioner took the same position in *Hilliard v. Astrue*, No. Civ. S-07-1759 KJM, 2009 U.S. Dist. Lexis 95019, at *7 (E.D. Cal. September 25, 2009).

[61] Pet. Br. at 23.

[62] *Id.* at 27.

Melloy said at the oral argument of this case: "Isn't the short answer . . . that Congress probably never thought of it. . . . They didn't think about it, because as I understand it, it was only up until about a year ago that even the Justice Department was not—had never taken the position [that] they were subject to setoff."[63] Judge Melloy is correct. Congress did not foresee an argument that no one even thought of for another 20 years.

Second, Congress had no reason in the 1985 EAJA amendments to use language similar to the direct payment provisions of § 406(b). Section 406(b) fees come out of the claimant's own Social Security benefits, which *must* be paid to the claimant in the absence of statutory authorization to pay part of them to someone else, because assignment of those benefits is prohibited by statute.[64] By contrast, an EAJA attorney's-fee award would naturally be paid to the attorney because the attorney earned it. And it is not subject to the anti-assignment law, so no special authorization was needed.

Third, EAJA's language unmistakably contemplates that attorneys receive EAJA fees: "where the *claimant's attorney receives fees* for the same work under both section 206(b) of [the Social Security] Act

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[63] *Ratliff v. Astrue*, oral argument at 15:33 to 15:47 (available at http://www.ca8.uscourts.gov/oralargs/oaFrame.html) (last visited December 20, 2009).

[64] 42 U.S.C. 407(a).

and [EAJA], the claimant's attorney refunds to the claimant the amount of the smaller fee."[65]

Fourth, as discussed above, the legal background against which Congress enacted EAJA confirms that Congress indeed did use language that authorizes direct payment of attorney's fees to attorneys in appropriate circumstances, such as to avoid offset by a client's creditor.

F. Well-reasoned fee-shifting cases after EAJA's enactment hold that an attorney's-fee award may not be paid to a client as a windfall or offset by a creditor, even when the creditor is the federal government.

The distinction between the client's right to seek an award of attorney's fees under a fee-shifting statute, and the attorney's right to receive the fees if the attorney has not already been paid, remained well-recognized in the years after EAJA was enacted in 1980 and re-enacted in 1985. In several cases, as here, a prevailing party's creditor sought to take an attorney's-fee award, arguing that it belonged to the prevailing party. But courts consistently rejected such claims, even where the creditor was the federal government, reasoning that allowing this offset would undermine the aims of fee-shifting statutes, and concluding that while the right to seek a fee award

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[65] Section 3 of the 1985 amendments (emphasis added).

belongs to the client, the right to receive the fee once awarded belongs to the attorney who earned it.

The Fourth Circuit in 1989 held that the federal government could not offset an attorney's-fee award against the plaintiff's debt to the government. The government had statutory and common-law offset rights, but neither allowed the government to take the attorney's fee. The court saw the issue as whether Congress's "desire to have private enforcement of invasions of financial privacy by the government will be undermined if the very offender of the statute is let off the hook from paying attorney's fees which in effect provide the mechanism by which the enforcement is brought to bear."[66] The court concluded that the purpose of the award would be frustrated if the government were allowed to offset the attorney's fee against the client's debt.[67]

In an Eighth Circuit case in 1993, the plaintiff had recovered a judgment under 42 U.S.C. 1983 and received an award of attorney's fees under § 1988. The plaintiff's creditors sought to execute on the award of attorney's fees, arguing that it belonged to the plaintiff. The court held that the attorney's fees belonged to the attorneys: "The clear Congressional intent and purpose of § 1988 was to encourage

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[66] *Duncan v. U.S. Dept. of the Army*, 887 F.2d 1078, 1989 WL 117742, at *3, No. 88-2143 (October 4, 1989) (unpublished table decision).

[67] *Id.*

attorneys to prosecute constitutional violations. . . . Whatever priority the [creditors] have with respect to their lien on the judgment in this case has no effect on the award of § 1988 fees."[68]

The Fifth Circuit in 1997 reached the same result. The plaintiff sued the federal government for wrongful disclosure of federal tax information. Along with damages, he recovered attorney's fees under 26 U.S.C. 7430, which closely parallels EAJA but applies to federal tax claims.[69] The government sought to offset the attorney's-fee award against his tax debts, under its common-law and statutory right of offset. But the court refused to allow the offset, reasoning that a court-awarded attorney's fee is to go to the attorney, not to the plaintiff, and thus may not be offset against the plaintiff's debts: "That the statute provides that attorneys' fees are to be awarded to the prevailing party is not controlling. The issue 'is not whether plaintiff is nominally to receive the money but whether ultimately it is to go to her attorney or to be credited toward defendant in repayment of plaintiff's debt.' . . . [T]he prevailing party is only nominally the person who receives the award; the

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[68] *Curtis v. City of Des Moines*, 995 F.2d 125, 129.

[69] *Miskovitch v. Commissioner*, 200 F.3d 351, 353 (5th Cir. 2000); *Pate v. United States*, 982 F.2d 457, 459 (10th Cir. 1993).

real party in interest vis-a-vis attorneys' fees awarded under the statute are the attorneys themselves."[70]

Courts also recognized the need to avoid the windfall that would occur if the attorney's fee were paid to an indigent client who had not paid the attorney. In 1982, a federal district court ordered that attorney's fees awarded under EAJA to plaintiffs represented by a Legal Assistance Foundation be paid directly to plaintiffs' counsel.[71] In 1985, a federal district court ordered that attorney's fees awarded under EAJA to prisoners, while made in the names of the prisoners, must be paid to their attorney, because it would be "foolish, if not imprudent, to direct that counsel's fees be paid directly to an inmate or inmates."[72]

The Federal Circuit in 1992, in a case where the attorney *had* been paid by his client in the ordinary pay-as-you-go manner, declined to order that a statutory fee be paid directly to the attorney, but expressly distinguished cases that "involve *pro bono* counsel where the award was paid directly to counsel in order to avoid giving the prevailing parties, usually prisoners or indigents, a windfall."[73] Social Security cases

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[70] *Marré v. United States*, 117 F.3d 297, 304 (internal citation and footnote omitted).

[71] *Grand Boulevard Improvement Assoc. v. City of Chicago*, 553 F. Supp. 1154, 1169 (N.D. Ill. 1982).

[72] *Wedra v. Thomas*, 623 F. Supp. 272, 278 (S.D.N.Y. 1985).

[73] *FDL Technologies, Inc. v. Nathan*, 967 F.2d 1578, 1580 n.1.

are similar to *pro bono* cases in that attorneys *always* work without payment, except for the possibility of an EAJA fee or a § 406 fee at the end of the case, because the law forbids them from charging fees on a pay-as-you-go basis.

Thus, until the Commissioner began taking EAJA fees in Social Security cases to pay plaintiffs' unrelated debts, courts reasoned persuasively that in cases in which the attorney had not already been paid, the right to apply for a fee belongs to the party, but the attorney's fee is paid to the attorney—and is not available to the client's creditor, even if the creditor is the federal government. Likewise, in cases involving indigent clients, courts ruled that the attorney's fee is paid to the attorney.

Nothing has changed to make the reasoning of these courts less persuasive. In fact, Congress amended EAJA again in 1992,[74] 1995,[75] 1996,[76] and 1998[77] without changing direct fee payments to attorneys. That Congress never changed the fee provisions in effect since 1980, or § 3 of the 1985 amendments integrating fees under EAJA with fees awarded under the Social Security Act, suggests no congressional dissatisfaction with the federal case

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[74] Pub. L. No. 102-572, 106 Stat. 4506.

[75] Pub. L. No. 104-66, 109 Stat. 722.

[76] Pub. L. No. 104-121, 110 Stat. 863.

[77] Pub. L. No. 105-368, 112 Stat. 3342.

law reaching this result.[28] And when Congress in 1992 amended EAJA to address fees in veterans' benefits cases—and used the same language it used in the 1985 amendments regarding fees in Social Security cases—it affirmatively expressed satisfaction with the status quo under which attorneys in Social Security cases, not their indigent clients or their clients' creditors, received EAJA fees.

II. EAJA's purpose and legislative history show that attorney's-fee awards should be paid to attorneys.

A. EAJA's purpose is to encourage attorneys to represent people who have meritorious claims by providing fees in appropriate cases.

A statute should be read "faithful to its apparent purpose." *Blanchard v. Bergeron*, 489 U.S. 87, 100 (1989) (Scalia, J., concurring). "[S]tatutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning." *Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir. 1945) (Hand, L.), *aff'd*, 326 U.S. 404 (1945).

The "specific purpose" of a fee-shifting statute is "to enable potential plaintiffs to obtain the assistance of competent counsel in vindicating their rights." *Kay*

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[28] *Barnhart v. Walton*, 535 U.S. 212, 220 (2002); *Commodity Futures Trading Comm. v. Schor*, 478 U.S. 833, 845-46 (1986).

v. Ehrler, 499 U.S. 432, 436 (1991). Attorneys are more likely to provide legal services if they may be paid for them. "[L]awyers are in the business of practicing law, and . . . like other business people, they are and must be concerned with earning a living." *Evans v. Jeff D.*, 475 U.S. 717, 758 (1986) (Brennan, J., dissenting) (footnote omitted). Encouraging attorneys to provide their services by offering to pay their fees works only if lawyers, not their clients, are paid attorney's fees if the case is won. "[I]f plaintiffs . . . find it possible to engage a lawyer based on the statutory assurance that *he will be paid* a 'reasonable fee,' the purpose behind the fee-shifting statute has been satisfied." *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 565 (1986) (*Delaware Valley I*) (emphasis added).

Without an attorney, Kills Ree could not have sued the Commissioner. EAJA made it possible for her to find an attorney and enforce the law. Fee-shifting statutes, to be sure, were not designed to improve the financial lot of attorneys. *City of Burlington v. Dague*, 505 U.S. 557, 563 (1992). But neither were they designed to improve the short-term financial lot of a few plaintiffs or their creditors, at the expense of the broader public interest in encouraging attorneys to take similar meritorious cases in the future.

This Court observed in *Sullivan v. Hudson* in 1989 that "we find it difficult to ascribe to Congress an intent [in EAJA] to throw the Social Security

claimant a lifeline that it knew was a foot short."[79] In *Sullivan*, the Court found that the purposes of EAJA would not be served by interpreting it so as to provide an "incentive . . . for attorneys to abandon claimants."[80] Here, the Court should reject an interpretation that would discourage attorneys from taking Social Security cases in the first place, which would be directly contrary to Congress's purposes in enacting EAJA.

Attorneys are the engine that makes the adversary system run, and the adversary system, as the Chief Justice observed this Term, is "central to maintaining the rule of law." *Mohawk Industries, Inc. v. Carpenter*, No. 08-678, Tr. of Oral Arg. 25. EAJA's purpose—to encourage attorneys to take meritorious cases challenging government action and thereby to allow even the indigent to enforce the rule of law—is satisfied only if an attorney who earns a fee receives it.

B. EAJA's legislative history confirms that attorney's fees should be paid to attorneys.

The legislative history of Congress's 1985 reauthorization of EAJA confirms that Congress specifically understood and intended that at least in Social Security cases—where attorneys are otherwise

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[79] 490 U.S. 877, 890.

[80] *Id.*

forbidden from collecting fees from their clients—EAJA fees are payable directly to attorneys. The House Report on the reauthorization bill, in explaining the provisions added to authorize EAJA fees in Social Security cases while preventing double-dipping by attorneys, states directly that the amended provisions of EAJA would "*permi[t] the attorney to seek recovery* under both" EAJA and the Social Security Act, and that the attorney may only "*keep* the larger fee. . . ."[81] Thus, "*an attorney collecting attorney fees under the EAJA* would have to use such fees to reduce" any fee withheld from the claimant's benefits under § 406(b).[82] The report, like the statutory language itself, shows that Congress understood that the attorney collects any fees awarded both under EAJA and the Social Security Act, and incorporated that understanding into the statute.

More broadly, EAJA's legislative history confirms that allowing the government to divert attorney's fees away from attorneys would contradict the statute's goal: enabling people who lack substantial financial security to hire lawyers to challenge unjustified government actions. "[T]he specific purpose of the EAJA is to eliminate for the average person the financial disincentive to challenge unreasonable governmental actions." *Commissioner, INS v. Jean*, 496

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[81] H.R. Rep. No. 99-120 at 20 (1985) (emphasis added).

[82] *Id.* at 19 (emphasis added).

U.S. 154, 163 (1990). The statute itself states that Congress intended EAJA "to diminish the deterrent effect of seeking review of, or defending against, governmental action by providing in specified situations an award of attorney fees, expert witness fees, and other costs against the United States."[83] EAJA's history leaves no doubt that Congress enacted it "to eliminate the barriers that prohibit small businesses and individuals from securing vindication of their rights in civil actions and administrative proceedings brought by or against the Federal Government."[84] Congress recognized that, "[f]or many citizens, the costs of securing vindication of their rights and the inability to recover attorney fees preclude resort to the adjudicatory process."[85]

In short, as Senator Grassley observed in floor discussions of the reauthorization of EAJA, "the Act was designed to provide those of modest means with access to the judicial process, hence the title—Equal Access to Justice Act."[86] EAJA, Senator Grassley stated, "allowed the little guy to fight city hall and to actually come out ahead if he prevailed in

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[83] Pub. L. No. 96-481, § 202(c)(1), 94 Stat. 2325 (1980), 5 U.S.C. 504 note.

[84] H.R. Rep. No. 96-1005 at 9 (1980), quoted in *Scarborough v. Principi*, 541 U.S. 401, 406 (2004).

[85] S. Rep. No. 96-253 at 5 (1979), quoted in *Sullivan v. Hudson*, 490 U.S. 877, 883 (1989).

[86] 129 Cong. Rec. S3916 (Mar. 24, 1983).

litigation."[87] As Senator Domenici put it, the Act reflected Congress's recognition that "[e]qual justice is not available when one cannot afford to fight."[88]

The legislative history further demonstrates that the means Congress chose to achieve these ends was to ensure *reasonable compensation to counsel* in cases where a financially eligible litigant successfully challenged unreasonable government action. The 1980 House Report emphasized that

> the computation of attorney fees should be based on prevailing market rates without reference to the fee arrangements between the attorney and client. The fact that attorneys may be providing services at salaries or hourly rates below the standard commercial rates which attorneys might normally receive for services rendered is not relevant to the computation of compensation under the Act. In short, the award of fees is to be determined according to general professional standards.[89]

The Report reflected a purpose to provide an adequate incentive for lawyers to take meritorious cases for needy litigants by *compensating* them for their efforts at rates consistent with those they normally would receive for similar work for paying clients.

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[87] 130 Cong. Rec. S13296 (Oct. 3, 1984).

[88] 131 Cong. Rec. S9998 (July 24, 1985).

[89] H.R. Rep. No. 96-1418 at 15, 1980 U.S.C.C.A.N. 4984, 4994.

Similarly, in discussing the statutory cap on fees, the Report made clear that an award of fees was to pay attorneys: "no attorney . . . may be *compensated* at a rate in excess of $75 per hour unless special factors justify a higher fee."[90] Using attorney's fee awards to pay clients' unrelated debts contravenes Congress's goal of compensating attorneys.

III. Alternatively, even if an EAJA fee award is nominally payable to a Social Security claimant, the attorney has a beneficial interest in the payment and it is therefore not subject to offset.

Even if EAJA's language providing that a court "shall award to a prevailing party . . . fees and other expenses" were read as requiring that the party nominally receive the attorney's fee, that reading would still have to be reconciled with the language and purpose of the statute as a whole, which establish that in a Social Security case in which no fees have been or will be paid directly by the client, the fees awarded are to be used to pay the attorney. Even under the government's interpretation of "award to a prevailing party," the construction that would best give effect to all the words of the statute, including the requirement that the fees must have been "incurred" by the party and the statute's express contemplation that the attorney will "receive[ ]"

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[90] *Id.* (emphasis added).

EAJA fees in Social Security cases, would be that the payment, although made in name to the party, would be for the benefit of the attorney whose fees were not otherwise paid, and would thus be impressed with a trust in the attorney's favor. *Cf. Sprint Commun. Co. v. APCC Servs., Inc.*, ___ U.S. ___, 128 S.Ct. 2531, 2538-43 (2008) (recognizing distinction between legal and beneficial interest in a recovery); *id.* at 2552 n.2 (Roberts, C.J., dissenting) (same).

This construction would serve EAJA's purpose of fostering representation of litigants whose cases have merit. It would also reflect the common sense understanding that a Social Security plaintiff who has paid her attorney nothing is not entitled to retain the benefit of an attorney's-fee award at the expense of the attorney. Under traditional equitable principles, an implied or constructive trust arises "where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession."[91] Put another way, where a recipient of identifiable property or funds would be unjustly enriched at the expense of another if he retained the funds, "the recipient may be declared a constructive trustee, for the benefit of the claimant."[92] A common situation where a trust is implied to avoid unjust

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[91] *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 213 (2002).

[92] Restatement (3d) of Restitution, Tentative Draft No. 6, § 55 (2008).

enrichment is where a person has received a payment "to which [another] has a superior legal or equitable entitlement," as "[w]here the claimant has furnished the value for which the defendant is compensated or reimbursed."[93] That is true here: the fees result from and are intended as payment for the attorney's successful efforts, the party's entitlement to an award assumes there is an obligation to pay the fees to the attorney (otherwise they were not "incurred"), and the statute contemplates that the attorney will "receive[]" the fees.[94] Thus, even under the Government's interpretation of EAJA's language, the attorney's fees, even if nominally payable to the client, would belong to the attorney and thus not be subject to offset.

Treasury regulations foreclose offset of payments made for the benefit of a person who does not owe a debt to the government. The regulations define "offset" as "withholding funds payable by the United States . . . *to satisfy a debt owed by the payee*," and define a "payee" as "a person who is entitled to the *benefit* of all or part of a payment" from the government.[95] Because a Social Security claimant who

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[93] *Id.*, Tentative Draft No. 5, § 48 & comment d(1) (2007); *see, e.g., Barnes v. Alexander*, 232 U.S. 117 (1914) (recognizing constructive trust in favor of attorneys to secure entitlement to fees generated through their efforts).

[94] *Cf. Curtis v. City of Des Moines*, 995 F.2d 125 (8th Cir. 1993) (recognizing attorneys' interest in fee award under 42 U.S.C. 1988).

[95] 31 C.F.R. 285.5(b) (emphasis added).

receives an EAJA award, even if nominally the recipient of the fee, is not entitled to retain the benefit of the fee, the regulations do not allow offset because the claimant is not the beneficiary of the fee. Indeed, to underscore the point, the regulations go on to forbid offset against a person who receives "a payment . . . solely in that person's capacity as a representative payee for another person having the beneficial interest in the payment."[96]

IV. Neither *Evans v. Jeff D.* nor *Venegas v. Mitchell* answers the question presented here.

In *Evans v. Jeff D.*, this Court held that a district court may refuse to award attorney's fees under a fee-shifting statute if the plaintiffs have waived them in settling their case: "we consider the question whether attorney's fees *must* be assessed when the case has been settled by a consent decree granting prospective relief to the plaintiff class but providing that the defendants shall not pay any part of the prevailing party's fees or costs. We hold that the District Court has the power, in its sound discretion, to refuse to award fees."[97] The Court reasoned that "Congress bestowed on the 'prevailing *party*' (generally plaintiffs) a statutory eligibility for a discretionary award

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[96] *Id.* 285.5(e)(5).

[97] 475 U.S. 717, 720 (1986).

of attorney's fees in specified civil rights actions."[98] Congress did not forbid a party from waiving the right to seek a fee award.[99]

But the right to seek a fee award is different from the right to receive the fee. *Evans* could not have decided who is entitled to receive fees when an award is made to an indigent client because there was no fee award in *Evans*, and hence no such issue. As the Federal Circuit recognized in 2006: "Under fee-shifting statutes in general, there is a distinction between the party's entitlement to claim an award of fees and the attorney's right to receipt of fees that are awarded."[100] The same year, the Ninth Circuit noted: "Once the prevailing party exercises her right to receive fees, the attorney's right to collect them vests, and he may then pursue them on his own."[101]

In 1996, the Ninth Circuit explained the reasons for distinguishing the right to seek an award from the right to receive the resulting fees: "Once the power [to seek a fee award] is exercised . . . the attorneys' right vests, and the defendant's duty becomes fixed. . . . The work was done by and the fees are for the plaintiff's attorney. They must be directed to the

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[98] *Id.* at 730 (footnotes omitted).

[99] *Id.*

[100] *Willis v. Gov't. Accountability Office*, 448 F.3d 1341, 1347 (footnote omitted).

[101] *Pony v. County of Los Angeles*, 433 F.3d 1138, 1142.

attorney."[102] Otherwise, plaintiffs would receive fee awards, and attorneys often would not be paid: "[l]eft to the normal vicissitudes of life, substantial sums would be diverted from their intended purpose. Actions of the client or of the client's creditors (or heirs) would often intervene."[103] This would "thwart the Congressional purpose" and "would also make no sense at all and would lead to unconscionable results."[104] This distinction between the right to apply for a fee and the right to receive it is implicit in this Court's recognition that the "real parties in interest," when attorneys seek higher fee awards, are attorneys. *Gisbrecht v. Barnhart*, 535 U.S. 789, 798 n.6 (2002).

The reasoning of *Evans*, moreover, does not extend to the issue presented here. *Evans* explained that its holding furthers the purpose of the civil rights laws because allowing a plaintiff to waive the right to seek a fee encourages settlement: "a general proscription against negotiated waiver of attorney's fees in exchange for a settlement on the merits would itself impede vindication of civil rights, at least in some cases, by reducing the attractiveness of settlement."[105] But if (as here) a fee award has been made, the claimant's rights have already been vindicated.

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[102] *Virani v. Jerry M. Lewis Truck Parts & Equip.*, 89 F.3d 574, 578-79 (footnote omitted).

[103] *Id.* at 579.

[104] *Id.*

[105] *Evans*, 475 U.S. at 732.

Letting the government take an attorney's fee awarded after a Social Security case has been won impairs the purpose of both the Social Security laws and EAJA: an attorney whose fee is taken is less likely to take such cases in the future, so meritorious Social Security claims will go unpaid and unreasonable government action will go unchallenged.

The Commissioner points to this Court's statement in *Evans* that "while it is undoubtedly true that Congress expected fee shifting to attract competent counsel to represent citizens deprived of their civil rights, *it neither bestowed fee awards upon attorneys* nor rendered them nonwaivable or nonnegotiable. . . ."[106] Read in context, this says that Congress did not bestow the *right to seek fee awards*—the only issue in *Evans*—upon attorneys.

Evans recognized that attorney's fees, if awarded, would be paid to the attorney: "any award of costs or fees would inure to the benefit of Idaho Legal Aid."[107] Otherwise, the attorneys would not have had standing to dispute their clients' right to waive the fees. In addition, this Court's statement in *Evans* that allowing a party to waive an attorney's fee "may, in the aggregate and in the long run, diminish lawyers' expectations of statutory fees in civil rights cases"[108]

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[106] 475 U.S. at 731-32 (emphasis added).

[107] 475 U.S. at 721 n.2.

[108] 475 U.S. at 741 n.34.

recognizes that an attorney's fee, if awarded, goes to the attorney.

In *Evans*, this Court dismissed as "remote" the likelihood that allowing a client to bargain away an attorney's-fee award would reduce the pool of lawyers who would take such cases.[109] But the consequences of the lawyer not being paid are different here, for three reasons. First, *Evans* involved a fee waiver to settle a case, whereas here the attorney's fee was taken after the attorney had litigated and won. The disincentive to future representation is greater where a lawyer has seen a case through to victory, successfully obtained a fee award, then sees the fee vanish.

Second, a lawyer may be able to protect against a client bargaining away the lawyer's fee by requiring the client, at the outset of the case, to forgo this option. *Evans*, 475 U.S. at 766 (Brennan, J., dissenting). As the Ninth Circuit noted in 1999, "civil rights lawyers can protect their interest in a fee award simply by executing contracts."[110] But in a Social Security case, a contract between an attorney and client will not protect a fee from offset by the government. 31 U.S.C. 3727(b) ("An assignment [of a claim against the United States] may be made only after a claim is allowed, the amount of the claim is

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[109] *Id.*

[110] *Gilbrook v. City of Westminster*, 177 F.3d 839, 874.

decided, and a warrant for payment of the claim has been issued.").

Third, the economic circumstances facing civil rights plaintiffs and social security claimants are different, and make the theoretical problem in *Evans* a concrete reality here:

> While the likelihood of a chilling effect may be remote in civil rights cases, it is a real result in social security disability cases. As evidenced from the numerous cases in which awards of attorney's fees have already been used to pay the debts of clients, attorneys are losing their earned fees. This is predictable in the social security benefits context. Plaintiffs are disabled people, unable to pursue gainful employment and frequently in distressed financial circumstances. This is exacerbated by the years it takes to pursue a claim through both the administrative process as well as the court process.[11]

The government's reliance on *Venegas v. Mitchell*, 495 U.S. 82 (1990), is as unpersuasive as its reliance on *Evans*. *Venegas* holds only that 42 U.S.C. 1988 does not invalidate attorney's-fee contracts that require the plaintiff to pay an attorney *more* than a statutory fee award. In the course of resolving that issue, *Venegas* reiterates the rule of *Evans* that "it is the party, rather than the lawyer," who is eligible for

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[11] *Quade v. Barnhart*, 570 F Supp. 2d 1164, 1173 (D. Ariz. 2008).

an award of fees, and states that *Evans* "rejected the argument that the entitlement to a § 1988 award belongs to the attorney rather than the plaintiff."[112] More precisely, *Evans* rejected the argument that the entitlement to *seek* a § 1988 award belongs to the attorney rather than the plaintiff.

In short, the issue in *Venegas* was whether the attorney was entitled to receive the statutory fee *and* the additional amount by which the contractual fee exceeded the statutory fee. To the extent that *Venegas* bears on the issue here, the opinion, like *Evans*, implicitly recognizes that the attorney ultimately is the proper recipient of a statutory attorney's fee. In fact, *Venegas* approvingly cites *Blanchard v. Bergeron*, in which this Court held that a fee award must provide "reasonable compensation . . . for the time and effort expended by the attorney," and so is not limited by a fee agreement that provides for a smaller fee.[113]

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[112] *Venegas*, 495 U.S. at 87, 89.

[113] *Blanchard*, 489 U.S. at 93.

V. The Commissioner imagines problems that do not exist, ignores the problems that his position creates, unnecessarily imposes federal regulation of matters that traditionally are regulated by state bar rules, and subverts most fee-shifting statutes.

A. The Commissioner does not identify a single instance of a practical problem that has actually arisen.

The Commissioner theorizes that paying EAJA attorney's fees and costs directly to attorneys—as the Commissioner did until 2006—will create practical problems. He claims that courts will need to "partition" EAJA awards between attorneys and other experts. He speculates that federal courts will become "embroil[ed]" in "collateral disputes" over how to distribute EAJA awards. He hypothesizes that "unusual and cumbersome outcomes" will bedevil the courts. And he says that federal courts will face multiple fee requests from multiple counsel and experts.[114]

These assertions are groundless. The Commissioner does not cite a single such dispute in a Social Security case in the 20 years that the Commissioner regularly paid EAJA fees to attorneys. Nor does he cite such a dispute in any other EAJA case in the 30 years that EAJA has been in effect, or for that matter in *any* case under *any* fee-shifting statute. Likewise,

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[114] Pet. Br. at 11-12 and 19-21.

the Commissioner does not describe a single problem he has had from 2006 to the present in effectuating district court decisions holding that EAJA fees should be received by the attorneys who earned them, or a single problem in the Eighth Circuit (where fees cannot be offset because of this case) or in the Fifth Circuit (where the Commissioner does not offset fees because of circuit precedent).[115] And the Commissioner does not suggest why problems that have not arisen in the past will arise in the future.

The Commissioner says that fees should be paid to prevailing parties because the parties and their attorneys may "disagree whether the prevailing party paid the agreed-to fees in full or in part before the court granted an EAJA award," and that "the prevailing party may have paid some or all of the bills submitted to her by her attorneys."[116] But the large majority of EAJA applications are made in Social Security or veterans' cases, where attorneys are barred by law from charging clients directly, and may be paid only by the government.[117] And in the relatively few EAJA applications made in other types of cases, the billing records and cost itemizations submitted by attorneys in support of their applications would ordinarily make clear whether fees, costs, or expenses have already been paid. In any

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[115] Petition for a Writ of Certiorari at 14-15.

[116] Pet. Br. at 12, 20.

[117] P. 2-5, 17, *supra*.

event, the Commissioner cites no instance of such a dispute ever actually occurring.

The Commissioner's solution to an imaginary problem itself would cause significant problems. The Commissioner argues that any obligation of clients to pass along court-awarded fees and costs to their attorneys is a matter for state-court litigation: "[D]isputes between EAJA award recipients and their attorneys or other hired professionals concerning their financial obligations to each other are appropriately resolved under applicable non-EAJA law."[11] But the money will already have been spent before the state court lawsuit is even drafted; the client is often judgment-proof; the transaction costs of a lawsuit are significant compared with the modest size of the average EAJA fee; and a lawsuit by an attorney against a client will destroy the attorney-client relationship, thus frustrating the purpose of EAJA. *See Sullivan v. Hudson*, 490 U.S. 877, 890 (1989) (disruption of attorney-client relationship would "frustrat[e] . . . the very purposes behind the EAJA itself, [so] Congress cannot lightly be assumed to have intended it."). So the Commissioner's solution—"Go sue your client"—is no solution at all.

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[11] Pet. Br. at 21.

B. EAJA treats "fees," "other expenses," and "costs" alike—all are payable to the attorney, to be distributed by the attorney as appropriate.

EAJA provides for awards, under appropriate circumstances, of "fees and other expenses"[119] and "costs."[120] As the Commissioner notes, EAJA treats "fees and other expenses" and "costs" alike. The Commissioner claims that "[n]o one has disputed that the phrase 'award[ ] to the prevailing party' in Section 2412(a)(1) directs the payment of 'costs' to the prevailing party, rather than her attorney."[121] Actually, no one has addressed the point, but examining it shows that the Commissioner is wrong, both as to whom "fees and other expenses" are payable and as to whom "costs" are payable.

In Social Security cases, the prohibition on charging a client a fee as the case progresses means that attorneys always advance the value of their services. Likewise, attorneys typically advance the costs required to litigate the case. The Commissioner recognizes this—he publicly advises claimants that "if a Federal court rules in your favor, under the Equal Access to Justice Act (EAJA), your attorney may request reimbursement of the expenses he or she

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[119] 28 U.S.C. 2412(d)(1)(A); "fees and other expenses" are defined at 28 U.S.C. 2412(d)(2)(A).

[120] 28 U.S.C. 2412(a)(1).

[121] Pet. Br. at 16.

incurred in representing you."[122] The government should not be able to take an award for costs, advanced by the attorney, to pay the client's unrelated debt. Nor should an attorney who advanced costs be required to negotiate to get a client to endorse the government's check for costs over to the attorney. The same principles apply to an award of fees.

Indeed, this case illustrates the anomalies created by the Commissioner's theory that the government is entitled to take awards of expenses and costs, as well as fees. The district court awarded attorney's fees of $2,112.60 and, as an expense, South Dakota sales tax of $126.75.[123] (South Dakota is one of the few states that imposes sales taxes on attorney's fees.) The Commissioner took the attorney's fee *and* the sales tax that Ratliff would have paid to the State of South Dakota had she received her fee, but that never became due because the government took the fee.

Although EAJA awards in most states will not include sales tax, they ordinarily will include costs such as service of process, and, in non-*in forma pauperis* cases, the $350 filing fee. The traditional approach, and the only reasonable one, is to pay the award of expenses and costs to the attorney and let

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[122] *Social Security Handbook*, § 2019.7, available at http://www.socialsecurity.gov/OP_Home/handbook/handbook.20/handbook-2019.html (last visited December 20, 2009).

[123] Pet. App. 23a.

the attorney reimburse the client for any expenses or costs the client advanced.

The Commissioner claims that the plaintiff may have paid expert witnesses during the course of the litigation. But in a Social Security case, review ordinarily is conducted on the record made below, so expert witnesses are rarely involved.[124] In non-Social Security cases, experts typically are retained by attorneys, and the expense of hiring them is often advanced by attorneys, so paying an award of those expenses to an indigent client is irrational. As with other expenses, reimbursement of expert witness expenses logically should be made to the attorney to distribute appropriately.

C. Existing state bar rules regulate this area effectively, so there is no need for federal regulation of how attorneys distribute fees, expenses, and costs.

In non-Social Security cases, a party may have paid attorney's fees before the EAJA award, or may have paid expert witness expenses and costs. The Commissioner's failure to cite a single dispute between an attorney and a client about who is entitled to receive EAJA attorney's fees, expert witness

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[124] 42 U.S.C. 405(g) (Title II) and 42 U.S.C. 1383(c)(3) (Title XVI) (review is conducted on the record, except if there is material new evidence, and good cause for failing to incorporate it into the record in a prior proceeding).

expenses, or costs shows that existing legal rules work exceedingly well. An attorney who receives money in which a third party has an interest is required to put the money in the attorney's trust account; to promptly pay the money to the person to whom it belongs; and, if there is a dispute, to keep the money separate until the dispute is resolved.[125] Mishandling client trust funds is punishable by sanctions up to and including disbarment.[126]

Hypothetical problems that have never occurred are a poor justification for requiring, as a matter of federal law, that all payments for fees, expenses, and costs go to the client. State bar ethics rules regulate this area appropriately and efficiently. The potential penalties for violating those rules give them serrated teeth. The Commissioner's federal one-size-fits-all rule for attorney's fees, expenses, and costs—under which the government takes them all or the client receives them all, no matter who advanced them—

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[125] American Bar Association, *Annotated Model Rules of Professional Conduct*, Rule 1.15 (6th ed. 2007). All states except California have adopted some form of Rule 1.15. http://www.abanet.org/cpr/mrpc/model_rules.html (last visited December 20, 2009). California has a similar rule, and requires attorneys to use "extraordinary care and fidelity in dealing with money and property belonging to their clients." *Howard v. State Bar*, 793 P.2d 62, 65 (Cal. 1990).

[126] *Standards for Imposing Lawyer Sanctions* (American Bar Association 1992) 16-17, available at http://www.abanet.org/cpr/regulation/standards_sanctions.pdf (last visited December 20, 2009).

needlessly displaces the state bar rules that require attorneys to distribute those funds appropriately.

"Absent a clear indication of Congressional intent," this Court is "reluctant to federalize" state law, "particularly where established state policies . . . would be overridden." *Santa Fe Indus. v. Green*, 430 U.S. 462, 479 (1977). Regulation of lawyers historically is a core state function. *Hoover v. Ronwin*, 466 U.S. 558, 569 n.18 (1984). EAJA should not be read to create federal regulation of this area, invading a subject traditionally and effectively regulated by the states, and thereby creating problems where none now exist.

D. The Commissioner's theory subverts most fee-shifting statutes, including 42 U.S.C. 1988.

Congress has enacted more than a hundred fee-shifting statutes.[127] Perhaps most important among them is 42 U.S.C. 1988, which has played a major role in the enforcement of civil rights laws by making it financially possible for private counsel and *pro bono* organizations to represent the often impecunious plaintiffs who serve the public's interest in enforcing civil rights legislation.[128] Many fee-shifting statutes

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[127] *Marek v. Chesny*, 473 U.S. 1, 43 (1985) (Brennan, J., dissenting).

[128] S. Rep. No. 94-1011, at 2 (1976), reprinted in 1976 U.S.C.C.A.N. 5908, 5910 ("In many cases arising under our civil

(Continued on following page)

use language similar to the "award to a prevailing party" language found in EAJA.[129] Section 1988 uses "allow the prevailing party," which in substance is the same as "award to a prevailing party." The two cases on which the Commissioner primarily relies, *Evans v. Jeff D.* and *Venegas v. Mitchell*, both involve § 1988.

Where fee-shifting statutes use similar language, this Court interprets them alike. *Northcross v. Board of Education*, 412 U.S. 427, 428 (1973). Thus, a decision in this case that EAJA's "award to a prevailing party" language requires that an attorney's fee in a Social Security case be paid to a client, and that the client's creditor can take the attorney's fee, would apply to many fee-shifting statutes including § 1988.

"[T]he overriding statutory concern [of § 1988] is the interest in obtaining independent counsel for victims of civil rights violations." *Kay v. Ehrler*, 499 U.S. 432, 437 (1991). Fee-shifting statutes accomplish this purpose by providing attorney's fees to attorneys who successfully prosecute such cases—by ensuring, as this Court has put it, that "[w]here a plaintiff has obtained excellent results, his attorney should recover a *fully compensatory fee*." *Hensley v. Eckerhart*,

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rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer.").

[129] *Buckhannon Board and Care Home, Inc., v. West Virginia Dept. of Health and Human Resources*, 532 U.S. 598, 600 (2001) ("Numerous federal statutes allow courts to award attorney's fees and costs to the 'prevailing party.'").

461 U.S. 424, 435 (1983) (emphasis added). Fee awards intercepted by creditors do not compensate attorneys. Even if no creditors intervene, some clients who receive attorney's fee checks will spend them. Either result defeats the statute's purpose to "enable civil rights plaintiffs to employ reasonably competent lawyers without cost to themselves if they prevail." *Venegas v. Mitchell*, 495 U.S. 82, 86 (1990).

CONCLUSION

In § 3 of the 1985 amendments to EAJA, Congress provided fees to encourage attorneys to represent Social Security claimants in meritorious cases. The statute expressly distinguishes between the client's right to an "award" of fees and the attorney's right to "receive[ ]" the fees, and provides that where "the claimant's attorney receives fees" under both § 3 and the Social Security Act, the attorney refunds the amount of the smaller fee to the client. These provisions unmistakably denote the distinction between the right to an "award" of fees and the right to "receive[ ]" them.

Where the government takes the attorney's fee to pay the client's unrelated debt, the client and the government receive a windfall—the client by having a debt paid, and the government by not having to pay the attorney. In the short run, the windfall is at the expense of the attorney. In the long run, the windfall is at the expense of disabled people who have

wrongfully been denied Social Security benefits, because they will be less likely to find attorneys willing to represent them. And the windfall is at the expense of the rule of law, which a lawyer's services are ordinarily necessary to vindicate.

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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Appendix

Section 3 of the Act of August 5, 1985, Pub. L. No. 99-80, § 3, 99 Stat. 186, 28 U.S.C. 2412 note provides:

> Section 206(b) of the Social Security Act (42 U.S.C. 406(b)(1)) shall not prevent an award of fees and other expenses under section 2412(d) of title 28, United States Code. Section 206(b)(2) of the Social Security Act shall not apply with respect to any such award but only if, where the claimant's attorney receives fees for the same work under both section 206(b) of that Act and section 2412(d) of title 28, United States Code, the claimant's attorney refunds to the claimant the amount of the smaller fee.

Title 28 U.S.C. 2412(d)(1)(A) provides:

> Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

Title 42 U.S.C. 406(b)(1)(A) and (b)(2) provide:

> (b) Fees for representation before court.
>
> (1)(A) Whenever a court renders a judgment favorable to a claimant under this title [42 U.S.C. 401 *et seq.*] who was represented before the court by an attorney, the court may determine and allow as part of its judgment a reasonable fee for such representation, not in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment, and the Commissioner of Social Security may, notwithstanding the provisions of section 205(i) [42 U.S.C. 405(i)], but subject to subsection (d) of this section, certify the amount of such fee for payment to such attorney out of, and not in addition to, the amount of such past-due benefits. In case of any such judgment, no other fee may be payable or certified for payment for such representation except as provided in this paragraph.
>
> . . .
>
> (2) Any attorney who charges, demands, receives, or collects for services rendered in connection with proceedings before a court to which paragraph (1) is applicable any amount in excess of that allowed by the court thereunder shall be guilty of a misdemeanor and upon conviction thereof shall be subject to a fine of not more than $500, or imprisonment for not more than one year, or both.

Title 42 U.S.C. 1383(d)(2)(A) provides:

> The provisions of section 206 [42 U.S.C. 406] . . . shall apply to this part [42 U.S.C. 1383 *et seq.*] to the same extent as they apply in the case of title II [42 U.S.C. 401 *et seq.*]. . . .[1]

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[1] Pub. L. No. 108-203, § 302(a)(1)(A), 118 Stat. 519 (2004). This law became effective on March 1, 2005, and sunsets on February 28, 2010. *Id.* § 302(c), 42 U.S.C. 1383 note; *see* 72 Fed. Reg. 44,766 (August 9, 2007).

REPLY BRIEF

FEB 12 2010

No. 08-1322

In the Supreme Court of the United States

MICHAEL J. ASTRUE,
COMMISSIONER OF SOCIAL SECURITY, PETITIONER

v.

CATHERINE G. RATLIFF

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

The question presented in this case lies at the intersection of two distinct statutory regimes: the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412, and the provisions of Title 31 (see Gov't Br. 2-3) that govern the administration by the Department of the Treasury (Treasury) of the Treasury Offset Program. EAJA directs that, when a prevailing litigant in a suit against the United States satisfies various statutory prerequisites, the court "shall award to a prevailing party * * * fees and other expenses." 28 U.S.C. 2412(d)(1)(A). Under the statutory provisions that govern the Treasury Offset Program, all "funds payable by the United States" (31 U.S.C. 3701(a)(1)) to an individual who owes a delinquent federal debt are subject to administrative offset except where the particular category of payments is exempt pursuant to statute. See 31 U.S.C. 3716(c); Gov't

Br. 33-34 & n.12. The attorney-fee award in this case was payable to respondent's client (Ruby Willow Kills Ree) under the plain terms of EAJA; it is undisputed that Kills Ree owed a delinquent debt to the United States; and no federal statute or regulation exempts EAJA awards from offset.[1] As our opening brief explains, those three propositions taken together establish that the Eighth Circuit erred in declining to allow an offset.

Respondent's efforts to avoid that conclusion are for the most part variations on a single theme: that attorneys rather than prevailing parties are the true beneficiaries of EAJA awards because Congress expected and intended that such awards would ultimately flow to the prevailing party's lawyer. It is true that prevailing parties who are awarded EAJA fees are often obligated by contract to pay over the fees to their lawyers. Nevertheless, EAJA fees are payable to the prevailing party

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[1] Respondent does not contend that any federal statutory provision exempts EAJA awards from offset. Respondent argues, for the first time in her merits brief to this Court, that such awards are exempt from offset under 31 C.F.R. 285.5(e)(5), which states that no offset is available for a payment made to a person "solely in that person's capacity as a representative payee for another person having the beneficial interest in a payment." See Resp. Br. 8, 46. Respondent's reliance on Section 285.5(e)(5) is misplaced. The term "representative payee" is defined by regulation to mean "a person named as payee on the payment voucher certified by the payment agency who is acting on behalf of a person entitled to receive the benefit of all or part of the payment." 31 C.F.R. 285.5(b). Representative payees include attorneys (for their clients) and parents (for their children). 67 Fed. Reg. 78,940 (2002) (discussing 31 C.F.R. 285.5(e)(5)); see 72 Fed. Reg. 1285 (2007). As we explain below, the prevailing party rather than her lawyer is the intended beneficiary of an EAJA award, and an outstanding obligation to pay for legal services does not convert the prevailing party into a "representative payee" for the attorney.

in the first instance, and the statute's underlying purpose is to enhance the party's ability to pursue meritorious claims, not to confer financial benefits on lawyers. In these circumstances, use of the offset mechanism is consistent with the text of the relevant statutes, and it directly furthers Congress's purposes in establishing the offset program—*i.e.*, to collect delinquent debts owed to the United States and, in particular, to prevent the payment of *additional* federal funds to persons who already owe such debts.

A. Fee Awards Under EAJA Are Payable In The First Instance To The Prevailing Party, Not To Her Attorney

1. EAJA directs that, when the statutory prerequisites to a fee award are satisfied, the court "shall award to a prevailing party * * * fees and other expenses * * * incurred by that party." 28 U.S.C. 2412(d)(1)(A). The statute thus unambiguously identifies the "prevailing party" as the person "to" whom fees are awarded. See Gov't Br. 15-17. EAJA further specifies that the "party seeking an award of fees and other expenses" must submit an application that "shows that the party is a prevailing party and is eligible to receive an award." 28 U.S.C. 2412(d)(1)(B). The text is clear: "EAJA authorizes the payment of fees to a prevailing party," *Scarborough* v. *Principi*, 541 U.S. 401, 405 (2004), not to her attorney.[2]

Respondent contends (Br. 16) that Section 2412(d)(1)(B) uses "the noun 'award'" to mean a "deci-

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[2] Accord H.R. Conf. Rep. No. 1434, 96th Cong., 2d Sess. 21, 25 (1980) (explaining that EAJA "specifically allows for the *payment* of attorney fees (in addition to costs * * *) to the prevailing party" and embodies Congress's intent to "direct the United States to *pay* attorney fees and other expenses to a prevailing party") (emphasis added).

sion," and that Section 2412(d)(1)(A)'s use of "award" as a verb should similarly be understood to mean to "give a decision." She argues on that basis that, under Section 2412(d)(1)(A), the court must "'give a decision' to a prevailing party," but that "only the attorney who earned the fee * * * is entitled to receive" the actual payment. Pet. Br. 15-16 (emphasis omitted).

Respondent's position cannot be squared with either the words or the grammatical structure of Section 2412. Even the dictionary definitions that respondent cites confirm that the verb "award" means to "give *by* the decision of a law court" or to "grant * * * *by* judicial decree," not to "give a decision" itself. Resp. Br. 16 & n.39 (emphases added; citations omitted). In other words, a judicial decision is the *means* by which the court confers a right to payment upon the prevailing party; it is not itself the *thing* that the court gives (or orders the defendant to give) to the party. Cf. *Hewitt* v. *Helms*, 482 U.S. 755, 761 (1987) (explaining that "[i]n all civil litigation, the judicial decree is not the end but the means," and that "[a]t the end of the rainbow lies not a judgment, but some action * * * by the defendant that the judgment produces"). The context in which EAJA uses the verb "award" reinforces that conclusion. In directing the court to "award to a prevailing party * * * fees and other expenses * * * incurred by that party," 28 U.S.C. 2412(d)(1)(A), Congress specified both to whom (the prevailing party) and what (fees and other expenses incurred by the party) the court must award.

Respondent's agreement (at 56) that EAJA treats the payment of "fees and other expenses" in Section 2412(d) as it treats the payment of "costs" in Section 2412(a), confirms that EAJA directs payment of both to the prevailing party. See Gov't Br. 16. Section 2412(a)

makes clear that the "judgment for costs" that may be awarded must "be limited to *reimbursing* in whole or in part the prevailing party for the costs incurred by such party in the litigation." 28 U.S.C. 2412(a)(1) (emphasis added). If the government owed and paid an award of "costs" to the prevailing party's attorney, that payment would not "reimburs[e]" the prevailing party for her incurred costs.

2. The separate provision governing attorney fees in Social Security cases, 42 U.S.C. 406(b), furnishes an instructive contrast. When a successful Social Security claimant "who was represented before the court by an attorney" obtains a favorable judgment, "the court may determine and allow as part of its judgment a reasonable fee for such representation, not in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment." 42 U.S.C. 406(b)(1)(A). If a court's judgment sets the amount of a reasonable fee under Section 406(b), the Commissioner of Social Security (Commissioner) may separately certify the full amount of the court-determined fee "for payment to such attorney out of, and not in addition to, the amount of" the past-due Social Security benefits owed to the claimant. *Ibid.*; see Gov't Br. 5. Section 406(b)'s authorization for fees to be paid directly to attorneys highlights the absence of any similar language in EAJA. See *Manning* v. *Astrue*, 510 F.3d 1246, 1252 (10th Cir. 2007) (citing Section 406(b) and explaining that "Congress knows what language to use to award attorney's fees to an attorney and what language to use when it chooses to award the fees to the prevailing party"), cert. denied, 129 S. Ct. 486 (2008); *Stephens* v. *Astrue*, 565 F.3d 131, 138 (4th Cir. 2009) ("Congress's continued use of different language is particularly telling because Con-

gress has specifically acted to harmonize the EAJA with the Social Security Act.").

3. Respondent also relies (Br. 12-14) on Section 206(b) of EAJA. Act of Aug. 5, 1985 (1985 Act), Pub. L. 99-80, § 3(2), 99 Stat. 186 (enacting Section 206(b)) (reproduced at 28 U.S.C. 2412 note); see Gov't Br. 25. That provision clarified that no violation of law occurs "if, where the claimant's attorney receives fees for the same work under both [42 U.S.C. 406(b) and 28 U.S.C. 2412(d)], the claimant's attorney refunds to the claimant the amount of the smaller fee." 1985 Act § 3(2), 99 Stat. 186. Because that language assumes that a Social Security claimant's attorney will sometimes "receive[] fees * * * under" EAJA, respondent infers (Br. 12-13) that EAJA fees are payable to the attorney in the first instance.

That inference is unsound. As our opening brief explains (at 25-26 n.8, 29), lawyers who represent Social Security claimants will generally do so "on the express or implied promise of the plaintiff to pay the lawyer the statutory award, *i.e.*, a reasonable fee, if the case is won" and EAJA fees are awarded. *Venegas* v. *Mitchell*, 495 U.S. 82, 86 (1990). Section 206(b)'s reference to the attorney's potential "recei[pt]" of a fee award simply reflects that practical reality. See *Reeves* v. *Astrue*, 526 F.3d 732, 737 (11th Cir. 2008) (explaining that Section 206(b) demonstrates only that "Congress anticipated attorneys will often be the ultimate beneficiaries of the attorney's fees awarded under the EAJA"); accord *Stephens*, 565 F.3d at 139.

Section 206(b)'s use of the verb "refunds" reinforces that conclusion, because it indicates that any fees the attorney "receives" came from the claimant in the first instance. That holds true whether the attorney "re-

funds" fees that were reimbursed under EAJA or fees that were allowed under Section 406(b). Respondent's assertion (at 14) that a Section 406(b) fee payment can never be "refund[ed]" (*i.e.*, "returned") because it "is *never* paid initially to the client" is incorrect. Social Security claimants and attorneys normally enter into contingent-fee agreements, which are subject to court "review for reasonableness" under Section 406(b). See *Gisbrecht* v. *Barnhart*, 535 U.S. 789, 800, 803-805, 808-809 (2002). In cases where a court determines and allows a reasonable fee for the attorney's representation before the court, Section 406(b) permits the Commissioner to collect the approved fee on behalf of the attorney and certify it for "payment to such attorney out of" her client's past-due benefits (minus an assessment for that service). See 42 U.S.C. 406(b)(1)(A) (Commissioner "may" take such collection activity); 42 U.S.C. 406(d)(1) and (2)(B)(ii) (assessment should normally "achieve full recovery of the [government's] costs" of collection); 20 C.F.R. 404.1730(a), 416.1530(a) (Commissioner "will" pay court-approved fees "out of [the claimant's] past-due benefits"). Although the Commissioner in such cases acts as the attorney's collection agent, the attorney ultimately "receives" the fee payment from her client because the payment comes out of the client's funds.[3]

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[3] Respondent is also wrong in suggesting (Br. 15) that, under the government's reading of Section 206(b), an attorney must wait to collect any fees from her client until both Social Security and EAJA payments are available. EAJA fees may be awarded by the district court well before the claimant receives any past-due benefits on remand to the agency. See Gov't Br. 6 (citing *Shalala* v. *Schaefer*, 509 U.S. 292, 295-302 (1993)); Resp. Br. 15 ("[I]n the large majority of cases * * *, an EAJA fee awarded when the case is remanded precedes, by about a year, the agency's decision whether it will award benefits, which determines whether there will be a § 406(b) fee."). Section 206(b)

B. A Prevailing Party's Contractual Obligation To Pay Her Attorney Any EAJA Fees She Receives Does Not Make Those Fees Payable To The Attorney In The First Instance, And It Does Not Prevent Use Of The Offset Mechanism To Collect The Prevailing Party's Pre-Existing Debt To The United States

The litigant who receives an EAJA award is frequently required by contract to pay the funds over to her attorney (see p. 6, *supra*), and several of this Court's decisions reflect the expectation that attorneys will be the ultimate recipients of any EAJA fees awarded (see Resp. Br. 19-21).[4] That practical reality, however, does

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permits attorneys to collect and "receive" from the client the relevant amount under EAJA before the determination of past-due benefits would allow the attorney to collect Social Security fees under 42 U.S.C. 406(b)(1)(A).

[4] EAJA awards under 28 U.S.C. 2412(d)(1)(A) are limited to "fees and other expenses * * * incurred by [the prevailing] party." EAJA awards may sometimes serve to compensate the party for money she has already paid to her attorney. A party may also "incur" attorney fees by making a contractual commitment to pay her attorney any EAJA award she receives.

For instance, a party will "incur" attorney fees if she accepts an obligation to pay counsel for legal services contingent upon either success on the merits or an award of EAJA fees, see Resp. Br. 18, and both attorneys and clients generally contemplate that, if counsel has not yet been paid, any statutory fee award will be used to compensate counsel. Several courts of appeals have thus recognized correctly that the party can "incur" fees even though the party was nominally represented by counsel *pro bono publico*. See, *e.g.*, *Morrison* v. *Commissioner*, 565 F.3d 658, 662-666 (9th Cir. 2009) (explaining *pro bono* cases and holding that a party "incurs" fees "when [its] obligation to repay fees is contingent upon the party's successful recovery of fees under the statute"); *Ed A. Wilson, Inc.* v. *GSA*, 126 F.3d 1406, 1409-1410 (Fed. Cir. 1997) (discussing, *inter alia*, *Phillips* v. *GSA*, 924 F.2d 1577 (Fed. Cir. 1991)); cf. *Blanchard* v. *Bergeron*, 489 U.S. 87, 93-94, 96 (1989)

not alter the fact that EAJA fees are payable in the first instance to the prevailing party. And because that is so, the government may offset those fees to collect the party's delinquent debt.

1. This Court in *Venegas* noted the prevalence, in the context of civil-rights litigation, of contracts between lawyer and client under which the client agrees to pay over to her attorney any fees awarded under 42 U.S.C. 1988. See 495 U.S. at 86. Social Security claimants and their lawyers commonly enter into similar agreements. See p. 6, *supra*. The existence of such agreements, however, does not support respondent's contention that EAJA awards are payable to attorneys in the first instance. To the contrary, if awards under federal fee-shifting statutes were payable to attorneys in the first instance, such contractual commitments would be superfluous because the attorney would automatically receive payment of any such award. While recognizing the prevalence of such agreements, the Court in *Venegas* emphasized that "the party, rather than the lawyer," is "entitle[d] to receive the fees" awarded under Section

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(holding that an express "contingent-fee contract does not impose an automatic ceiling on an award of attorney's fees" under Section 1988; explaining that "Congress * * * broadly requir[ed] all defendants to pay a reasonable fee to all prevailing plaintiffs" and that attorneys who ultimately receive a "reasonable" fee will not obtain a "windfall"). But cf. *United States* v. *Claro*, 579 F.3d 452, 464-466, 468 (5th Cir. 2009) (explaining the "general rule" that "fees are 'incurred' when the litigant has a legal obligation to pay them" but stating that *pro bono* representation is an "exceptional situation[] for which an award of attorney's fees is not contingent upon an obligation to pay counsel"). That approach to "incurred" fees, which respondent appears to embrace (at 18), ultimately reflects that the attorney's right to payment derives from the prevailing party's (implied or express) agreement to incur the obligation to pay counsel.

1988, and that Section 1988 "controls what the losing defendant must pay, not what the prevailing plaintiff must pay his lawyer." 495 U.S. at 87-88, 90.

Similarly in *Evans* v. *Jeff D.*, 475 U.S. 717 (1986), this Court explained that "the language of [Section 1988] * * * bestow[s] on the 'prevailing *party*' (generally plaintiffs) a statutory eligibility for a discretionary award of attorney's fees" and does not "bestow[] fee awards upon attorneys" themselves. *Id.* at 730-732 & n.19 (footnote omitted). Although the Court noted that an "award of costs or fees [in the case] would inure to the benefit of Idaho Legal Aid," that observation reflected that the plaintiffs "effectively" had "assign[ed] [their] right" to payment of any court-ordered award to the organization. *Id.* at 721 n.2, 731. As in *Venegas*, the Court's discussion of the plaintiffs' "assignment of this right to an attorney," *id.* at 731, is inconsistent with respondent's contention that attorneys are entitled by statute to payment of such awards.

2. Respondent contends (Br. 23-27) that when EAJA was enacted in 1980, the phrase "award to a prevailing party" had a "settled judicial meaning" that authorized payment of fee awards directly to attorneys. That argument lacks merit.

The decisions on which respondent relies do not interpret the phrase "award to a prevailing party" and appear to be grounded on more general equitable principles. And although the decisions provide little analysis to support their conclusions, they are consistent with the principle that a client's implied agreement to provide her attorney with any statutory fee award she may receive will give rise to a constructive trust that the attorney may enforce once the client receives payment of the

award.[5] When a client agrees to "convey a specific object" like a statutory fee award to an attorney before he has acquired it, that promise "will make the [client] a trustee as soon as he gets a title to the thing." *Barnes* v. *Alexander*, 232 U.S. 117, 121 (1914). Such an agreement to pay a contingent attorney fee "out of [a] fund" obtained in litigation will therefore give rise to a constructive trust and "create[] a lien" benefitting the attorney "the moment the fund [is] received" by the client-trustee. *Ibid.*; see *Sereboff* v. *Mid Atl. Med. Servs., Inc.*, 547 U.S. 356, 363-365 (2006) (explaining that "a constructive trust or equitable lien" is imposed once the agreed-to fund comes "into the [trustee's] hands") (citation omitted); cf. *Great-West Life & Annuity Ins. Co.* v. *Knudson*, 534 U.S. 204, 213-214 (2002) (concluding that restitution in the form of "a constructive trust or an equitable lien" is unavailable when the pertinent funds or

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[5] See *Miller* v. *Amusement Enters., Inc.*, 426 F.2d 534, 539 (5th Cir. 1970) (relying on "equitable powers" to "assure that the [statutory] fees allowed" under Title II of the Civil Rights Act of 1964 will pay for "legal services rendered and will not go to the litigants"; explaining that a "formal agreement" by the prevailing litigants to pay the statutory award to counsel is not necessary); *Brandenburger* v. *Thompson*, 494 F.2d 885, 888-889 (9th Cir. 1974) (following *Miller* and directing non-statutory fee to party's counsel under the court's "equitable power"), overruled by *Alyeska Pipeline Serv. Co.* v. *Wilderness Soc'y*, 421 U.S. 240 (1975) (holding that, in the absence of statutory authorization, attorney fee awards are generally prohibited under "American Rule" governing attorney fees); *Hairston* v. *R&R Apartments*, 510 F.2d 1090, 1093 (7th Cir. 1975) (following *Miller* and *Brandenburger* to direct statutory fees to counsel under the Fair Housing Act); *Rodriguez* v. *Taylor*, 569 F.2d 1231, 1245 (3d Cir. 1977) (explaining that "prevailing litigants" are entitled to "receive fee awards" under the Age Discrimination in Employment Act and following *Miller*, *Brandenburger*, and *Hairston* in concluding that the "fee awards must accrue to counsel"), cert. denied, 436 U.S. 913 (1978).

property "are not in [the trustee's] possession"); *Sereboff*, 547 U.S. at 362 (discussing *Great-West*).

Recognition of a constructive lien in this circumstance is fully consistent with the understanding that an award under EAJA (or under other federal fee-shifting statutes) is payable in the first instance to the prevailing party. Indeed, no such lien would be necessary if EAJA itself directed that the award be paid to the attorney under EAJA's own terms. Imposition of a constructive lien simply reflects an awareness that, when the prevailing party is contractually obligated to pay the award to his attorney, a court may legitimately act to ensure that the party complies with that obligation rather than diverting the funds to other uses.

Where, as here, a federal statute mandates a different disposition of the relevant funds, the constructive-trust principles described above are inapplicable. Once it is understood that an EAJA award is payable to the prevailing party, the statutory provisions governing the offset program unambiguously direct that the award be offset to collect any delinquent debt that the party owes to the United States. Although Congress has exempted certain categories of federal payments from the offset program, it has not exempted attorney-fee awards under EAJA or other fee-shifting statutes. Neither the prevailing party's contractual promise to pay the funds to her attorney, nor the equitable mechanism that might otherwise be used to enforce that promise, can super-

sede Congress's directive that the funds instead be used to repay the party's federal debt.[6]

3. As respondent explains (Br. 28-30), the government has frequently paid EAJA fees in Social Security cases directly to attorneys, either in compliance with a court order specifying the attorney as the proper payee, or pursuant to the claimant's assignment to the attorney of the claimant's right to payment. Contrary to respondent's contention, the government's invocation of the offset mechanism here is consistent with that practice. In most Social Security cases where EAJA fees are awarded, the claimant does not owe a delinquent debt to the government and is contractually obligated to trans-

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[6] Respondents discuss (Br. 24-25) one pre-EAJA court of appeals decision, *Plant* v. *Blazer Financial Services, Inc.*, 598 F.2d 1357, 1365-1366 (5th Cir. 1979), in which the court held that the creditor-defendant could not offset a court-ordered award of attorney fees against a debt owed to it by the plaintiff. *Plant* involved the Truth in Lending Act (TILA), 15 U.S.C. 1601 *et seq.*, whose fee-shifting provision makes a creditor who violates a debtor's rights "liable to that person" in an amount including "a reasonable attorney's fee." *Plant*, 598 F.2d at 1365 (quoting 15 U.S.C. 1640). The court of appeals held that the creditor could not offset the attorney-fee award against the debt owed to the creditor by the plaintiff, because "[t]o allow a setoff would in effect relieve the creditors in violation of the act of the attorney's fee expense in the case of an insolvent debtor * * * [and so] thwart the statute's individual enforcement scheme and its remedial objectives." *Id.* at 1366. The fee-shifting provision at issue in *Plant* did not contain the "prevailing party" language that Congress subsequently adopted in EAJA, and it predated this Court's decisions in *Jeff D.* and *Venegas*. In addition, the court in *Plant* arguably had greater latitude to consider the policies underlying the relevant fee-shifting statute than did the court below, since the creditor in *Plant* did not argue that another federal statute expressly authorized the offset that it sought to take. Here, by contrast, the government had express statutory authority to offset respondent's fee award against her delinquent debt to the United States. See Gov't Br. 2-4.

mit to her attorney any award that she receives. When the government is able to verify that those two conditions are satisfied, direct payment from the government to the attorney expeditiously satisfies both the government's obligation to the claimant and the claimant's obligation to her lawyer. The government's willingness to utilize that payment method (or to decline to appeal district court orders that direct payment to the attorney) does not cast doubt either on the proposition that EAJA fees are payable to the prevailing party in the first instance, or on the susceptibility of the fees to offset in a case where the claimant *does* owe a delinquent debt.[7]

Respondent's reliance (Br. 29-30) on the government's willingness in some cases to waive statutory restrictions on assignment is particularly misplaced. A claimant's assignment to her attorney of the right to EAJA fees presupposes that the right belongs to the claimant in the first instance. No assignment would be necessary if EAJA mandated payment of such fees to the attorney.

4. Respondents contend (Br. 34-35, 43-45) that, even if EAJA by its terms authorizes an award of fees to the prevailing party, the fees are only "nominally" paid to the party and are actually "for the benefit of the attor-

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[7] In one respect, the government's practice in this area has changed significantly in recent years. The Treasury Offset Program was extended in January 2005 to "miscellaneous" payments like attorney fees. See Gov't Br. 4. Until that time, the government did not typically seek to ascertain whether a prevailing Social Security claimant owed a delinquent debt to the United States, and identification of the proper payee of an EAJA award had less practical significance. In cases where a prevailing claimant does owe a delinquent debt, extension of the offset program to attorney fees has resulted in increased litigation over the question whether EAJA awards are payable in the first instance to claimants or to their attorneys.

ney." That argument reflects a fundamental misunderstanding of EAJA's purpose.

Congress recognized that "certain individuals, partnerships, corporations, and labor and other organizations may be deterred from seeking review of, or defending against, unreasonable government action because of the expense involved," and it enacted EAJA "to diminish the deterrent effect." EAJA, Pub. L. No. 96-481, Tit. II, § 202(a) and (c)(1), 94 Stat. 2325; see *Commissioner, INS* v. *Jean*, 496 U.S. 154, 163 (1990) (explaining that "the specific purpose of the EAJA is to eliminate for the average person the financial disincentive to challenge unreasonable governmental actions"). Congress sought to achieve that objective "by entitling certain prevailing parties to recover an award of attorney fees, expert witness fees and other expenses against the United States." H.R. Rep. No. 1418, 96th Cong., 2d Sess. 6 (1980); see *id.* at 7-9, 15. As respondent elsewhere acknowledges (see Br. 38), EAJA and other fee-shifting statutes "were not designed as a form of economic relief to improve the financial lot of attorneys," but rather were enacted "to enable private parties to obtain legal help in seeking redress for injuries resulting from the actual or threatened violation of specific federal laws." *Pennsylvania* v. *Delaware Valley Citizens' Council*, 478 U.S. 546, 565 (1986). The prevailing party is not simply a conduit through which EAJA fees may pass between the government and her attorney; she is the intended beneficiary of the statute.

This Court's decision in *Jeff D.* reinforces that conclusion. In *Jeff D.* the Court held that, *because* the relevant fee-shifting statute (in that case, Section 1988) conferred eligibility for fee awards on prevailing parties rather than on their attorneys, those parties could nego-

tiate away their entitlement to fees in order to extract other benefits from the defendant. See 475 U.S. at 730-732. The Court analogized such a settlement to one in which the plaintiff offers "a concession on damages to secure broader injunctive relief." *Id.* at 731. The Court's analysis confirms that the prevailing party has more than "nominal" status as the payee of an EAJA award.[8]

C. Allowing An Offset In These Circumstances Does Not Impermissibly Subvert The Purposes Of EAJA

Respondent contends (Br. 10, 37-39, 40, 50, 61-62) that allowing an offset in these circumstances would subvert the purposes of EAJA, in Social Security cases and more generally, by creating a disincentive for lawyers to represent impecunious clients. Respondent substantially overstates the seriousness of any deterrent effect on the provision of attorney services, and she ignores entirely the countervailing interests served by the statutory offset mechanism.

1. EAJA does not authorize an award of attorney fees to every litigant who prevails in a suit against the United States. Rather, Section 2412(d)(1)(A) authorizes fee awards to prevailing parties only when the government's position is not "substantially justified." 28 U.S.C.

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[8] In *Gisbrecht*, the Court stated that attorneys are "the real parties in interest" when they seek court approval of the fee that they may charge to a Social Security claimant under 42 U.S.C. 406(b). *Gisbrecht*, 535 U.S. at 798 n.6. In that context, the fee comes out of the monetary recovery that the client has already obtained in a court judgment. *Id.* at 795, 798 n.6. An EAJA fee, by contrast, is payable in addition to any recovery the plaintiff obtains in the suit. The Court in *Gisbrecht* explained that, because EAJA and Section 1988 permit "the prevailing party to recover fees from the losing party," those statutes are "of another genre" from Section 406(b). *Id.* at 802; see Gov't Br. 5-7.

2412(d)(1)(A). The "EAJA subsidy" thus "is not directed to a category of litigation that can be identified in advance," and a "lawyer will rarely be able to assess with any degree of certainty the likelihood that the Government's position will be deemed *so* unreasonable" as to justify an award. *Pierce* v. *Underwood*, 487 U.S. 552, 573-574 (1988). Given the substantial uncertainty regarding the prospects of ultimately obtaining an EAJA award that exists at the outset of every case, the possibility that any such award might be subject to offset is unlikely to have a meaningful incremental effect on a lawyer's decision whether to undertake the representation. See *ibid.* (concluding that, unlike cases involving Section 1988 awards, it is "impossible" to base an "economically viable contingent-fee practice" upon the acceptance of cases in which there is a fair prospect of securing an EAJA award).[9]

2. Any such disincentive is particularly attenuated in the Social Security context, where 42 U.S.C. 406(b) provides an alternative source of attorney fees. See Gov't Br. 6-7, 25-26; p. 5, *supra*. In Social Security civil actions, Congress has authorized reasonable attorney fees to be paid out of the claimant's past-due benefits in all cases where a court judgment results in such benefits (not just those in which the government's position is not

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[9] In late 2007, the Tenth Circuit held that EAJA requires payment to the prevailing party and that EAJA awards may be offset under 31 U.S.C. 3716 for delinquent debts owed by a successful Social Security claimant. *Manning* v. *Astrue*, 510 F.3d 1246, 1249-1251, 1255 (10th Cir. 2007), cert. denied, 129 S. Ct. 486 (2008). Three other courts of appeals have since reached the same conclusion. See Pet. 17. Respondent has identified no evidence that those holdings have affected the ability either of Social Security claimants or of litigants more generally to secure legal representation.

substantially justified). 42 U.S.C. 406(b)(1)(A). The attorney is required to refund the smaller of the two awards if he receives fees under both Section 406(b) and EAJA. An offset against the EAJA award will therefore disadvantage the attorney only if the claimant prevails in her suit, the government's position is held not to have been substantially justified, *and* the EAJA award is larger than any fee under Section 406(b). The prospect that any particular suit will have that outcome is unlikely to be so great as to have any marked effect on lawyers' decisions whether to accept a case.[10]

3. Lawyers can readily determine whether potential clients owe debts that are subject to offset. Potential clients receive advance written notice of any debt subject to collection by offset, see 31 U.S.C. 3716(a)(1); 31 C.F.R. 285.1(h)(1), 285.5(d)(6)(ii)(A), and the Department of the Treasury will disclose such information to an attorney if the potential client provides a signed Privacy Act waiver. And if the client owes a debt subject to offset, the client has the opportunity to seek administrative review of the debt obligation and to agree to a written repayment plan that will prevent an offset from occurring, thus protecting any EAJA recovery from reduction. See 31 U.S.C. 3716(a) (requiring notice of those opportunities); 31 C.F.R. 285.1(h), 285.5(d)(6)(ii)(A).

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[10] To be sure, in cases where fees are awarded under both EAJA and Section 406(b), an offset against the EAJA award will affect the *claimant's* interests by requiring her to pay her attorney out of her past-due benefits rather than from a separate source of federal funds. Use of the offset mechanism in that circumstance, however, directly serves the government's substantial interest in collecting valid and delinquent debts owed to the United States, and in avoiding additional federal outlays to persons who owe such debts. See p. 19, *infra*.

4. Despite the foregoing, the Court may assume, *arguendo*, that the availability of an offset in these circumstances will have some marginal deterrent effect on the willingness of counsel to litigate Social Security cases, at least those that involve claimants who are known to owe delinquent debts to the United States and who have not entered into a repayment plan. The prospect of such effects, however, provides no basis for declining to enforce according to its terms the statutory regime that governs use of the offset mechanism. Respondent does not even cite the statutory provisions that establish the offset program, and she ignores the important policy interests they serve. Those provisions reflect Congress's commitment to collecting delinquent federal debts and, in particular, to avoiding *additional* federal outlays to persons who owe such obligations.

Although EAJA serves important policy objectives, every federal statute that authorizes funds to be paid out of the Treasury reflects Congress's determination that the authorized expenditures will further some public purpose. The effect of the offset mechanism is always to prevent the payment of federal funds that Congress has otherwise authorized to be paid, and many uses of that mechanism could plausibly be claimed to disserve, at least to some degree, the purposes of the underlying funding statute. A court cannot decline on that basis to enforce the offset provisions, nor can it appropriately undertake to balance the goal of the relevant funding statute against the goal of collecting delinquent federal debts. Rather, Congress has struck that balance itself by exempting some payments but not others from the coverage of the offset program. EAJA awards are not among the federal payments for which Congress has enacted an exemption. Thus, even if it could be shown

that application of the offset program to such awards will make it more difficult for Social Security claimants or other litigants to find attorneys, the Title 31 provisions that govern the offset program indicate that Congress is willing to bear that cost.

Finally, it bears emphasis that EAJA applies far beyond Social Security cases and applies to *every* "civil action (other than cases sounding in tort) * * * brought by or against the United States" except as otherwise specifically provided by statute. 28 U.S.C. 2412(d)(1)(A). Many individual, corporate, and organizational clients in such cases will pay all or part of the litigation bills of their attorneys, expert witnesses, or other legal specialists during the course of litigation pursuant to their agreements with those professionals. EAJA works within the confines of those traditional fee relationships by compensating the prevailing party for the litigation expenses and costs incurred by that party. See Gov't Br. 20-21. Nothing suggests that Congress intended to disrupt the traditional arrangement under which attorneys recover fees for services from their clients, and it would make little sense to direct EAJA awards to attorneys in all cases when attorneys often will have already been paid under fee agreements with their clients. EAJA's text in Section 2412(d) draws no distinction between Social Security and other cases, and, in all instances, has directed that EAJA fees and other expenses be awarded "to the prevailing party."

D. Use Of The Offset Mechanism In This Case Did Not Confer Any "Windfall" Upon The Government

Respondent asserts that, by applying an administrative offset to the EAJA award in this case, "the government received a windfall" and secured an "economic gain

independent of work, planning, or other productive activities that society wishes to reward." Resp. Br. 6 (citation and brackets omitted); see *id.* at 11-12. That argument is misconceived.

Contrary to respondent's contention, application of the offset mechanism in this case did not produce any "economic gain" for the government. The offset did not bring additional funds into the Treasury, but simply allowed the government to keep the money it had. To be sure, the offset allowed the government to avoid the outlay that the district court's EAJA award would otherwise have required. But because the offset reduced respondent's delinquent debt by the amount of the award, the government suffered a commensurate reduction in its "accounts receivable," and it therefore realized no economic gain.

In short, the offset functioned in this case precisely as Congress intended. The offset did not allow the government to avoid the adverse financial impact that the EAJA award would otherwise have caused, since the offset reduced the amount of money that the government is entitled to collect from respondent. The offset simply relieved the government of the burden of paying additional sums to a person who already owes a delinquent debt to the United States. If that outcome constituted a "windfall," a similar windfall would result from every use of the offset mechanism.

* * * * *

The judgment of the court of appeals should be reversed.

Respectfully submitted.

ELENA KAGAN
Solicitor General

FEBRUARY 2010

AMICUS CURIAE BRIEF

No. 08-1322

In The Supreme Court of the United States

MICHAEL J. ASTRUE,
COMMISSIONER OF SOCIAL SECURITY,

Petitioner,

v.

CATHERINE G. RATLIFF,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF *AMICI CURIAE* NATIONAL ORGANIZATION OF SOCIAL SECURITY CLAIMANTS' REPRESENTATIVES, AARP, NATIONAL SENIOR CITIZENS LAW CENTER, NATIONAL DISABILITY RIGHTS NETWORK, COMMUNITY LEGAL SERVICES, DISABILITY LAW CLINIC OF THE PENNSYLVANIA STATE UNIVERSITY DICKINSON SCHOOL OF LAW, EMPIRE JUSTICE CENTER, CLINICAL PROGRAM OF THE RUTGERS SCHOOL OF LAW – NEWARK, AND PENNSYLVANIA LEGAL AID NETWORK, INC., IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Once an attorneys-fee award is made under the Equal Access to Justice Act (28 U.S.C. § 2412(d)), may the fees be retained by the Government to recover a debt of the party, leaving the attorney's fee unpaid?

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THE INTEREST OF *AMICI CURIAE*[1]

1. The **National Organization of Social Security Claimants' Representatives (NOSSCR)** is a national membership organization comprising approximately 4,000 individuals, mostly attorneys, who represent individuals applying for Social Security and SSI benefits. NOSSCR members include employees of legal services organizations, educational institutions, and other nonprofits; employees of for-profit law firms and other businesses; and individuals in private practice.

NOSSCR members represent Social Security and SSI claimants before the Social Security Administration and in the courts. Over five percent of all federal district court filings in the twelve-month period ending September 30, 2006, were Social Security cases, and about half of those cases likely will result in some relief entitling NOSSCR members' clients to seek attorneys-fee awards under the Equal Access to Justice Act.

NOSSCR has a great interest in ensuring that its members' clients get the benefits for which they qualify, and that their clients continue to have improved access to the courts through payment of their

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

attorney's fees under the EAJA, as Congress intended. EAJA fees provide our members' clients improved access to the courts by enabling them to obtain representation in the appeal of wrongly-denied Social Security claims, as well as defraying the client's legal expenses where fees are received under both the EAJA and the Social Security Act.

2. **AARP** is a national nonpartisan, nonprofit membership organization that helps people over the age of 50 to have independence, choice and control in ways that are beneficial and affordable to them and society as a whole. AARP works to foster the health and economic security of individuals as they age, ensure access to high quality and economical health care, and ensure that older people have viable retirement options. Since many AARP members receive Social Security and SSI benefits to meet their basic needs, such as medicine, food, and rent, it is critical that they have access to attorneys when these benefits are denied. Without the payment to the attorney of awarded EAJA fees, many members will find it difficult to obtain needed representation.

The AARP Legal Counsel for the Elderly (LCE) provides free legal services for Washington, D.C. residents age 60 and older. LCE handles a variety of legal cases including Social Security and SSI cases. LCE has received EAJA attorneys' fees in the past and plans to seek them in the future.

3. The **National Senior Citizens Law Center (NSCLC)** is a nonprofit organization that advocates

before the courts, Congress and federal agencies to promote the independence and well-being of low income older Americans. In pursuit of this mission, NSCLC regularly litigates against federal agencies, including the Social Security Administration and relies on EAJA fees to offset the costs of litigation. While NSCLC does not provide representation in individual Social Security and SSI Disability appeals, these programs are an important part of NSCLC's advocacy effort because they are often the only means by which an individual may attain a modest degree of economic security in old age. It is essential that individuals have access to an attorney to represent them in federal court on disability appeals and that the incentive that EAJA provides for attorneys to take these cases not be diluted by offsetting government debts from attorneys-fee awards.

4. The **National Disability Rights Network (NDRN)** is the nonprofit membership association of protection and advocacy (P&A) agencies that are located in all 50 states, the District of Columbia, Puerto Rico, and the United States Territories. P&A agencies are authorized under various federal statutes to provide legal representation and related advocacy services, and to investigate abuse and neglect of individuals with disabilities in a variety of settings. The P&A System comprises the nation's largest provider of legally-based advocacy services for persons with disabilities. NDRN supports its members through the provision of training and technical assistance, legal support, and legislative advocacy, and

works to create a society in which people with disabilities are afforded equality of opportunity and are able to fully participate by exercising choice and self-determination. While most P&As do not represent Social Security and SSI entitlement cases, NDRN believes that it is critical that individuals with disability applying for Social Security and SSI have access to attorney representation when benefits are denied. Without the payment to the attorney of awarded EAJA fees, many individuals with disabilities will find it difficult to retain required attorney representation.

5. **Community Legal Services, Inc. (CLS)** is a non profit public interest law firm in Philadelphia that provides legal representation to low income Philadelphians. In addition to representing individuals in appeals of denials of Supplemental Security Income (SSI) cases, CLS has a long history of litigating class actions brought on behalf of SSI claimants and beneficiaries. CLS concentrates its representation on those who find it most difficult to find other representation, including the homeless, the mentally ill and those whose primary language is other than English. Most notably, in the realm of class actions, CLS was lead counsel in the case of *Sullivan v. Zebley*, where this Court upheld the claim that the Commissioner had misadjudicated the SSI claims of a class of 452,000 children. In both individual cases and in class actions, CLS pursues EAJA fees in order to defray the costs of its advocacy. All EAJA fees that are collected are used for the costs of representation

and are a significant part of CLS' yearly budget. Without such fees, the ability of CLS to represent low income clients alleging disability would be significantly affected.

6. The **Empire Justice Center** is a statewide not-for-profit law firm. Its mission is to protect and strengthen the legal rights of people in New York who are poor, disabled or disenfranchised through: systems change advocacy, training and support to other advocates and organizations, and high quality direct civil representation to individuals and classes. As part of that mission, advocates at the Empire Justice Center frequently represent disability claimants in the federal courts who have been denied Social Security and/or SSI benefits by the Social Security Administration. The fees received under the EAJA in those appeals are used exclusively by the Empire Justice Center to provide representation to other indigent claimants who might otherwise not have access to the justice system.

7. The **Pennsylvania Legal Aid Network, Inc. (PLAN, Inc.)** is a statewide not-for-profit corporation responsible for funding and overseeing the work of civil legal aid programs across Pennsylvania. Through the funding, training and support of fourteen programs, PLAN, Inc. helps assure that legal aid programs are able to deliver civil legal services to low income residents. Together, these programs represent approximately 100,000 individuals every year. PLAN, Inc.'s mission is to help assure that low income Pennsylvanians have access to legal

services. Part of the array of legal services funded by PLAN, Inc. and undertaken by the legal aid programs, includes representation of disability claimants in the federal courts who have been denied Social Security and/or SSI benefits by the Social Security Administration. The fees received under the Equal Access to Justice Act are used by the PLAN, Inc. programs to provide representation to other indigent claimants who might otherwise not have access to the justice system. Together, the civil legal aid programs funded by PLAN, Inc. annually represent thousands of disabled clients regarding their claims to Disability Insurance and/or SSI.

8. The **Disability Law Clinic of the Pennsylvania State University Dickinson School of Law** is a professional law office dedicated to teaching law students the practice of law while providing pro bono legal representation to individuals with disabilities in various legal matters. The Clinic represents indigent disabled persons who, it deems, would find it difficult or impossible to obtain private counsel. It uses fees which it receives under the EAJA exclusively for the benefit of its clients, for such purposes as obtaining independent medical and psychological evaluations as needed in furtherance of their legal claims.

9. The **Clinical Program of the Rutgers School of Law – Newark** is a professional law office dedicated to teaching law students the practice of law while providing pro bono representation to unrepresented and underserved individuals and groups. The Rutgers Urban Legal Clinic and Rutgers Child

Advocacy Clinic are the constituent components of the program that provide representation and assistance, respectively, to adults with disabilities seeking Social Security and SSI benefits and children with disabilities seeking SSI benefits. The Rutgers clinical program represents disabled persons in these matters who, it deems, would find it difficult or impossible to secure other counsel. It uses the fees received under the EAJA for the benefit of its clients to expand the quality and availability of services for them.

SUMMARY OF THE ARGUMENT

A. (1). Congress enacted the Equal Access to Justice Act to improve access to the courts for certain persons by paying their attorney's fees and costs.[2] The Government wishes to pay EAJA attorneys-fee awards to the party – after first offsetting the party's government debts – instead of paying the attorney's fee, arguing that the party would never receive the fee award if the party's attorney's fees were paid.[3]

The Commissioner's argument overlooks that the EAJA provides "fees and costs." By ignoring the subject of the award, the Commissioner attempts to convert an attorneys-fee award into monetary damages. There is no ambiguity in the EAJA to permit an

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[2] 28 U.S.C. § 2412(d) (2006).

[3] Commr.'s Br. 18.

interpretation that allows an award for the specific purpose of paying the party's attorney's fees to be converted into an award of general monetary damages, and if there were an ambiguity, sovereign immunity would forbid an interpretation that does not advance the purpose of the act.[4] Recovery of government debts does not improve access to the courts. The "Savings Provision"[5] shows Congress intended that the attorneys-fee award be paid to the attorney.

(2). This Court, in *Kay v. Ehrler*, explained that fee-shifting statutes are intended "to encourage potential claimants to seek legal advice before commencing litigation,"[6] and many cases have recognized that fee-shifting statutes will not do that if the fees are not paid to the attorney once awarded.[7]

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[4] *Richlin Sec. Serv. Co. v. Chertoff*, 553 U.S. ___, 128 S. Ct. 2007, 2019 (2008) (noting that the rule does not apply in the absence of ambiguity).

[5] Social Security Act § 206(b) (1985) Pub.L. 96-481, as amended by Pub.L. 99-80, § 3, Aug. 5, 1985, 99 Stat. 186. This language is uncodified.

[6] *Kay v. Ehrler*, 499 U.S. 432, 434 n.4 (1991) (*quoting Falcone v. IRS*, 714 F.2d 646, 647 (6th Cir. 1983)).

[7] *E.g.*, *Miller v. Amusement Enter., Inc.*, 426 F.2d 534, 539 (5th Cir. 1970); *Brandenburger v. Thompson*, 494 F.2d 885, 889 (9th Cir. 1974), *superseded by statute on other grounds, see Stanford Daily v. Zurcher*, 550 F.2d 464, 465 (9th Cir. 1977); *Hairston v. R. & R. Apartments*, 510 F.2d 1090, 1093 (7th Cir. 1975).

(3). This Court has not addressed the mechanics of paying fees once an attorneys-fee award has been made, under the EAJA or under Section 1988.[8] But even if Section 1988 fees were paid to the party, there are distinctions between Section 1988 and the EAJA that require paying the attorney's fee under the EAJA to the attorney. The EAJA requires that fees be "incurred" through an attorney-client relationship, which would not occur if the attorneys-fee award were used to pay debts instead of the attorney's fee.

(4). In Social Security court cases, an attorney may not charge a fee that is not approved by a court, and may not obtain approval of a Social Security Act fee unless and until benefits are awarded.[9] If benefits are awarded, it will generally be long after the EAJA attorneys-fee award, so the EAJA fees are the first – and sometimes the only – fees the attorney may receive. The risk that these fees will be lost to debt recovery would serve as a significant disincentive to representation in Social Security cases, especially for individuals with substantial debts, even when their claims have legal merit.

(5). The Commissioner says there will be increased problems with payment if the Court finds that EAJA attorneys-fee awards must be paid to the attorney, but this inaccurately implies that the

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[8] 42 U.S.C. § 1988 (2006).

[9] *Gisbrecht v. Barnhart*, 535 U.S. 789, 796 (2002).

Commissioner now sends payment to the party. Any purported disputes over division of the EAJA fees would come, if at all, after the fee is entrusted to the attorney, regardless of the payee's identity. The Commissioner's predictions of problems arising from the identity of the payee of the EAJA award are unfounded.

B. Even if EAJA attorneys-fee awards were to be paid to the party instead the attorney, Debt Collection Improvement Act[10] (DCIA) regulations[11] would permit offset of the payment only for the debt of the person with the beneficial interest. And because the payment of EAJA awards is made for a specific purpose – to pay the attorney's fee – the party would be a representative payee for the attorney, for whom the payment is intended. So payment of EAJA awards can only be offset for debts of the attorney.

ARGUMENT

A. The EAJA provides for attorneys-fee awards to improve access to the courts, not monetary damages.

Congress enacted the EAJA to make it easier for individuals to seek redress for unjustified government

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[10] Debt Collection Improvement Act of 1996, Pub.L. 104-134, § 31001(b) (1996), 31 U.S.C. § 3701 (2006).

[11] 31 C.F.R. § 285.5(b), (e)(5) (2009).

actions, including unreasonable denial of Social Security benefits, by paying fees to lawyers and nonprofit advocacy organizations who successfully challenge those actions. The government's diversion of the court's attorneys-fee award leaves the attorney's fees unpaid in ordinary Social Security cases. Recovery of the plaintiff's debts while leaving the attorney's fee unpaid is not compatible with the EAJA's provision of attorneys-fee awards.

(1) Unless EAJA attorneys-fee awards pay the attorney's fees, the EAJA's purpose of improving access to the courts is frustrated.

The Equal Access to Justice Act is one of many cost-shifting statutes intended to "promote private enforcement of Congressional policies."[12] The EAJA was enacted to improve access to the courts for small businesses and individuals by paying their attorney's fees when the Government has acted unreasonably.[13] It allows private parties of modest means to recover their cost of litigation – including attorney's fees – against the United States where the private party prevails in the litigation, the position of the United

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[12] DERFNER AND WOLF, COURT AWARDED ATTORNEY'S FEES, ¶ 5.02[1] (Matthew Bender 2004).

[13] 28 U.S.C. § 2412(d) (2006).

States is not substantially justified, in the absence of special circumstances.[14]

Congress never intended the EAJA to provide a way for the Government to collect debts it is owed, but intended it to provide attorney's fees and costs to make it easier for individuals harmed by unjustified Government actions to challenge those actions. Undermining the purpose of the EAJA, the Commissioner turns logic on its head by stating "[i]f, as the court of appeals held, attorneys were entitled to a direct EAJA payment from the government, the prevailing party would never 'receive' the fee award."[15] The Commissioner does not – cannot – explain how paying the attorney's fee prevents the party from receiving the benefit of the EAJA attorneys-fee award. The party has the right under the EAJA to the attorneys-fee award, but the award is distinct from its payment. The only purpose of the EAJA is to pay the attorney's fees and costs incurred by the prevailing party, so when the attorney's fee is paid, the party has received exactly what the EAJA provides. The Commissioner's contention to the contrary is illogical, and cannot be reconciled with the EAJA's language or purpose.

When interpreting a statute, "[i]t is the duty of the court to give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any

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[14] 28 U.S.C. § 2412(d)(1)(A) (2006).

[15] Commr.'s Br. 18.

construction which implies that the legislature was ignorant of the meaning of the language it employed."[16] The Commissioner urges the Court to give effect to the verb and the object ("award" and "to the prevailing party"), but to ignore the subject ("fees and costs") and the requirement that fees be "incurred." But ignoring what is being awarded, and why, materially alters the EAJA, turning it from a statute providing a specific benefit – payment of attorney's fees – into one providing monetary damages from which the Government may collect debts.

Congress is not indifferent to whether EAJA attorneys-fee awards pay the fees of the attorney. The EAJA was enacted to improve access to the courts by paying attorney's fees where the Government's position is unjustified, and its language contains no ambiguity which could allow it to accomplish an unrelated – and contradictory – purpose of collecting Government debts instead of paying the attorney's fee. And even if there were ambiguity in the statute, the EAJA must be strictly construed to provide only fees and costs because the EAJA is a waiver of sovereign immunity, and the award may only be for the purpose specified in the law.[17]

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[16] *Inhabitants of Montclair Tp. v. Ramsdell*, 107 U.S. 147, 152 (1883); *see also Chickasaw Nation v. United States*, 534 U.S. 84, 93 (2001).

[17] *Richlin Sec. Serv. Co. v. Chertoff*, 553 U.S. ___, 128 S. Ct. 2007, 2019 (2008) (noting that the rule requiring strict

(Continued on following page)

The Commissioner does not -- cannot -- deny that Congress intended to reduce the financial disincentive to challenges of unreasonable government action by providing for payment of litigation costs. And the Commissioner has not explained how his resistance to paying the attorney fees to the attorney can be reconciled with the EAJA's provision for attorneys-fee awards. Congress never intended that EAJA attorneys-fee awards be used to recover Government debts, or for any purpose other than helping eligible parties obtain representation, and thereby access to the courts.

The language of the EAJA shows that Congress expected EAJA attorneys-fee awards to be used to pay the attorney's fee. Where an attorney receives the EAJA attorneys-fee award, and also receives fees awarded (usually months or years later) under the Social Security Act, the attorney must refund the smaller fee to the client.[18] This requirement, known as the "Savings Provision," says,

> [W]here the claimant's attorney receives fees for the same work under both section 206(b) of that Act [section 406(b) of Title 42] and section 2412(d) of title 28, United States Code [subsec. (d) of this section], the

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construction due to sovereign immunity does not apply in the absence of ambiguity).

[18] *Gisbrecht v. Barnhart*, 535 U.S. 789, 796 (2002).

> claimant's attorney refunds to the claimant the amount of the smaller fee.[19]

The legislative history of the Savings Provision also shows that Congress expected EAJA attorneys-fee awards to be paid to the attorney, and knew that they were being paid to the attorney, when it adopted the Savings Provision to avoid the same services being compensated twice:

> [T]he EAJA award should be used as a set off to reduce the payment which the claimant would otherwise owe the attorney. Thus, . . . an attorney for a Social Security or SSI claimant would be precluded from receiving both EAJA and Social Security Act fees. Without this amendment it was argued, "double dipping" was possible. Such double payments are inappropriate and deprive[ ] the plaintiff of the benefits intended by EAJA. . . . [T]he attorney [is permitted] to seek recovery under both authorizations. The attorney, however, may keep the larger fee, but must return the amount of the smaller fee to the claimant.[20]

An attorney could only be paid twice for the same work if she received fees both under the EAJA and the Social Security Act. So Congress knew that EAJA

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[19] Social Security Act § 206(b) (1985), Pub.L. 96-481, as amended by Pub.L. 99-80, § 3, Aug. 5, 1985, 99 Stat. 186. This language is uncodified.

[20] H. Rep. No. 99-120, at 20, reprinted in 1985 U.S.C.C.A.N. 132, 148-49.

attorneys-fee awards were being paid to the attorney, expected payment to the attorney to continue, and never contemplated that the awards would be used for a purpose other than paying the attorney's fees and costs. The Commissioner's suggestion that Congress expected the EAJA attorneys-fee award to be paid to the party, who would then pay it to the attorney, who would then refund it to the party when it is the smaller fee, requires a process that is far too convoluted to be a natural and logical interpretation of the EAJA.

The experience of the *amici* is that the EAJA has historically accomplished its purpose of improving access to the courts. But the EAJA's purpose has been impaired by the Government's recent practice of attempting to recover debts from EAJA attorneys-fee awards instead of paying the attorney's fee. While we do not deny that recovery of Government debts is a legitimate activity, the purpose of the EAJA need not – and cannot – be perverted to accomplish an unrelated goal.

(2) The EAJA provides for attorneys-fee awards, not for monetary damages.

Courts have considered the question of whether litigants who receive attorneys-fee awards under fee-shifting statutes may receive payment personally instead of payment of their attorney's fees, and have concluded that fees must be paid to the attorney to avoid a windfall to the plaintiff, even though the

court awarded attorney's fees to the plaintiff. This Court explained in *Kay v. Ehrler* that the purpose of fee-shifting statutes is "to encourage potential claimants to seek legal advice before commencing litigation,"[21] and therefore attorneys-fee awards should not be made except to pay for representation. In *Miller v. Amusement Enterprises, Inc.*, the Fifth Circuit cautioned that attorney fees awarded under fee-shifting statutes must go to the lawyers, and not to the litigants themselves.[22] The Ninth Circuit reached the same conclusion in *Brandenburger v. Thompson*.[23] The Seventh Circuit has also ruled that fee awards to prevailing parties go directly to the attorneys to avoid the plaintiff receiving an unintended windfall.[24] The Third Circuit has reached the same conclusion.[25]

This is the same rule applied under the "common fund" and "common benefit" exceptions to the American Rule regarding attorney's fees and costs.[26] This Court has explained when evaluating fees under the

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[21] *Kay v. Ehrler*, 499 U.S. 432, 434 n.4 (1991) (*quoting Falcone v. IRS*, 714 F.2d 646, 647 (6th Cir. 1983)).

[22] *Miller v. Amusement Enter., Inc.*, 426 F.2d 534, 539 (5th Cir. 1970).

[23] *Brandenburger v. Thompson*, 494 F.2d 885, 889 (9th Cir. 1974), *superseded by statute on other grounds, see Stanford Daily v. Zurcher*, 550 F.2d 464, 465 (9th Cir. 1977).

[24] *Hairston v. R. & R. Apartments*, 510 F.2d 1090, 1093 (7th Cir. 1975).

[25] *Rodriguez v. Taylor*, 569 F.2d 1231, 1245 (3d Cir. 1977).

[26] *See e.g., Boeing Co. v. Van Gemert*, 444 U.S. 472, 479 (1980).

common fund doctrine that awarding fees only if the party has an attorney "rests on the perception that persons who obtain the benefit of a lawsuit without contributing to its costs are unjustly enriched at the successful litigant's expense."[27] The courts have reached the same conclusion where litigants are entitled to seek attorney's fees under Section 1988[28] – they are not entitled to receive the attorney's fees, even when the *pro se* litigant is an attorney.[29] These cases underscore that attorneys-fee awards must pay the attorney's fee, and may not be diverted to other purposes. There is nothing in this Court's decisions indicating an intent to overrule the cases requiring that attorneys-fee awards be used to pay the attorney's fee to avoid creation of a windfall, and at least one lower court has interpreted language in *Missouri v. Jenkins*[30] as authorizing direct payment of attorneys-fee awards to the attorney.[31]

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[27] *Boeing Co. v. Van Gemert*, 444 U.S. 472, 479 (1980).

[28] 42 U.S.C. § 1988 (2006).

[29] *Kay v. Ehrler*, 499 U.S. 432 (1991); *Gonzalez v. Kangas*, 814 F.2d 1411 (9th Cir. 1987); *Smith v. DeBartoli*, 769 F.2d 451, 453 (7th Cir. 1985); *Turman v. Tuttle*, 711 F.2d 148 (10th Cir. 1983) (per curiam); *Owens-El v. Robinson*, 694 F.2d 941 (3d Cir. 1982); *Wright v. Crowell*, 674 F.2d 521 (6th Cir. 1982) (per curiam); *Cofield v. Atlanta*, 648 F.2d 986, 987-88 (5th Cir. 1981); *Lovell v. Snow*, 637 F.2d 170 (1st Cir. 1981); *Davis v. Parratt*, 608 F.2d 717 (8th Cir. 1979) (per curiam).

[30] *Missouri v. Jenkins*, 491 U.S. 274, 285 (1989).

[31] *Gonzalez v. Comm'r of Soc. Sec. Admin.*, 564 F. Supp. 2d 317, 321-22 (D.N.J. 2008).

(3) This Court's Section 1988 decisions do not support the Commissioner's intent to use EAJA attorneys-fee awards to recover the party's government debts.

The Commissioner asserts that this Court's interpretations of Section 1988 fee awards establish that attorneys-fee awards should be paid to the party instead of the attorney, and that the EAJA requires the same result.[32] But these assertions are overstated. While there is no doubt that the "prevailing party" interpretation of both statutes provides that attorneys-fee awards are made to the prevailing party, this Court has not decided under either statute whether the attorneys-fee award, once made, must pay the attorney's fee. And the text of the EAJA requires that attorneys-fee awards pay the attorney's fee and does not provide monetary damage awards to pay an unrelated government debt. It does not require complex analysis to conclude that an attorneys-fee award pays the attorney.

An important distinction between Section 1988 fees and EAJA fees which the Commissioner neglects is that Section 1988 does not require that fees be "incurred." In a Section 1988 action, "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part

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[32] Commr.'s Br. 28.

of the costs," without a requirement that the plaintiff incur fees.[33] The EAJA is in stark contrast, providing:

> a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action.[34]

So the EAJA does not allow a party to request an attorneys-fee award unless there is an expressed or implied obligation to pay, or to reimburse previously paid attorney's fees, because the EAJA makes attorneys-fee awards conditional on fees being "incurred." As discussed below on page 23, prepayment of attorney's fees is unlikely, if even possible, in Social Security cases because non-EAJA fees may only be awarded after the party is awarded benefits, and nonprofit, *pro bono amici* attorneys do not charge non-EAJA fees. As the Federal Circuit has explained,

> [T]o be "incurred" within the meaning of a fee shifting statute, there must also be an express or implied agreement that *the fee award will be paid over to the legal representative*. The statute does not contemplate that a fee award may be made to a party to be retained. Thus, we have held in an

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[33] *Gilbrook v. City of Westminster*, 177 F.3d 839, 844 (9th Cir. 1999).

[34] 28 U.S.C. § 2412(d)(1)(A) (2006).

analogous situation that a party acting pro se is not entitled to an attorney fee award.[35]

As one court has analyzed it, the attorney's fees are incurred by the lawyer on behalf of the client where the EAJA fees, if awarded, are always paid to the attorney.[36] So fees are "incurred" where they will be paid to the attorney, through either an express or an implied agreement. But if they are paid to the party as monetary damages, and potentially used to recover Government debts before the attorney's fee is paid, the fee is never incurred. This defeats the purpose of the EAJA attorneys-fee award.[37]

Contrary to the Commissioner's assertions, nothing in the decisions of this Court requires payment of Section 1988 attorneys-fee awards, once made, to the plaintiff where the attorney's fee remains unpaid. And even if this were required under Section 1988, there are important differences between that statute and the EAJA which require that the EAJA attorneys-fee award be used to pay the attorney's fee.

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[35] *Phillips v. General Serv. Admin.*, 924 F.2d 1577, 1583 (Fed. Cir. 1991) (emphasis supplied).

[36] *See Jemas v. Comm'r of Soc. Sec. Admin.*, No. 08-4446 (FSH), slip op. at 5 and n.2 (D.N.J. Dec. 17, 2009); *see also Phillips v. General Serv. Admin.*, 924 F.2d 1577, 1583 (Fed. Cir. 1991) ("lawyer's fees are 'incurred by an employee' if they are incurred in his behalf, even though he does not pay them") (internal citations omitted).

[37] *Morrison v. C.I.R.*, 565 F.3d 658, 667 (9th Cir. 2009).

(4) Unlike other cases where EAJA fees may reimburse previously paid fees, ordinarily EAJA fees in Social Security cases must be payable to the attorney to assure that the attorney's fees are paid.

The language and purpose of the EAJA are inconsistent with an offset of EAJA attorneys-fee awards to recover the party's government debts. But even if the Court were to find this permissible where the award reimburses previously paid fees, in Social Security cases EAJA attorneys-fee awards must be paid to the attorney to assure the attorney's fee is paid. Fee restrictions in the Social Security Act make EAJA attorneys-fee awards very important in Social Security cases. And improving access to representation in Social Security cases is crucial because of the great importance to the *amici's* clients of Social Security benefits, which are intended to provide "income required for ordinary and necessary living expenses."[38]

In recent years, over 12,000 civil actions have been filed annually to challenge administrative denials of Social Security claims, representing 5% of all civil claims filed in federal court.[39] Over half of

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[38] 20 C.F.R. § 404.508 (2009).

[39] James C. Duff, *Judicial Business of the U.S. Courts: 2007 Annual Report of the Director*, at 150, http://www.uscourts.gov/judbus2007/appendices/C02ASep07.pdf (last visited Jan. 13, 2010).

awards of fees under the EAJA are in Social Security cases.[40] While this Court has recently considered the EAJA in cases where it reimburses the party's expense,[41] in Social Security cases the EAJA fees typically will be the first fees available, and sometimes the only fees. As this Court noted in *Gisbrecht*, attorneys can only charge fees for their court work on behalf of Social Security claimants after there has been an award of past-due benefits.[42] It is a criminal offense to collect any Social Security Act fees before past-due benefits have been awarded,[43] and they generally have not been awarded at the time when EAJA attorneys-fee awards are made. So the EAJA attorneys-fee award does not typically reimburse the party for fees previously paid in typical Social Security cases. If there is a refund of EAJA fees to the client due to the Savings Provision, it will normally come long after entry of judgment. And there is significant risk there will be no other fees.

According to the Social Security Advisory Board,[44] the federal courts enter judgment for the

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[40] *Comm'r of INS v. Jean*, 496 U.S. 154, 165 (1990).

[41] *See e.g., Richlin Sec. Serv. Co. v. Chertoff*, 553 U.S. ___, 128 S. Ct. 2007, 2013 (2008).

[42] *Gisbrecht v. Barnhart*, 535 U.S. 789, 795 (2002).

[43] *Gisbrecht v. Barnhart*, 535 U.S. 789, 796 (2002).

[44] Disability Decision Making: Data and Materials, Chart 69 (Social Security Advisory Board, May 2006), http://www.ssab.gov/documents/chartbook.pdf (last visited Jan. 12, 2010).

plaintiff and award benefits in only 5% of the Social Security claims appealed to district court, and enter judgment for plaintiff with a remand for further proceedings in 45%. The courts either dismiss or affirm in 50% of their Social Security cases. Of the cases remanded for further proceedings, 33% will never result in past-due benefits (including cases becoming moot due to death of an SSI claimant, withdrawal, dismissal, overpayment cases, or denial on the merits), so no Social Security Act fees will be awarded.[45] If EAJA attorneys-fee awards do not pay the attorney's fee, then the improved access to the courts Congress intended will be eroded, and it will be more difficult for the *amici* and other attorneys to assist Social Security claimants, even where unjustified Government actions have wrongly denied their claims.

The Court should rule that EAJA attorneys-fee awards must be used – as in other fee-shifting statutes – to pay or reimburse attorney's fees incurred by the prevailing party, and are not available for other purposes. This position gives meaning and import to the careful use of the word "incurred" in the statutory language.[46] And it respects the realities faced by Social Security claimants seeking representation in court.

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[45] *Id.* at Chart 67.

[46] 28 U.S.C. § 2412(d)(1)(A) (2006).

While NOSSCR cannot know the scope of the disincentive to representation of individuals wrongly denied Social Security benefits that would result from debt collection from EAJA attorneys-fee awards, it has some experience in those circuits which currently have debt collection. The Commissioner's brief does not provide data regarding the extent of debt collection in Social Security cases, or in other cases. NOSSCR has been unable to find any non-Social Security cases in which EAJA attorneys-fee awards were offset to recover government debts. However, NOSSCR has evidence that the impact is significant in Social Security cases. Two NOSSCR members who practice in the Tenth Circuit, and one who practices in the Fourth Circuit, have reported that over 20% of their recent EAJA attorneys-fee awards were offset to pay debts. Other members report that 10% or less of EAJA attorneys-fee awards are offset to pay debts when offset is permitted.

The nonpayment of EAJA attorneys-fee awards would be a significant disincentive to representation. NOSSCR has received reports that some members are no longer representing individuals in court who have, or may have, Government debts. And nonprofits which do not charge fees to their clients will be hampered in their ability to represent clients who wish to challenge unreasonable Government actions if they do not receive the EAJA attorneys-fee awards.

(5) The Commissioner correctly sends EAJA attorneys-fee and costs awards which are not seized to recover debts to the prevailing party's attorney now, whether the party or the attorney is the payee, contrary to implications of his brief.

While the Commissioner's brief deftly demonstrates that attorneys-fee awards under EAJA are *awarded to* the prevailing party, he confuses the pre-award question of who may receive *the award* with the post-award question of whether, once the attorney's fees are awarded, the attorney's fee must be paid. The Commissioner's brief relies heavily on portraying the EAJA as having specified to whom the attorneys-fee award is payable, using the word "payable" thirty-five times in his brief. But the word "payable" does not appear in the EAJA, and the payment of fees has not been analyzed in this Court's cases interpreting the EAJA or other fee-shifting statutes.

The Commissioner's brief dissects the language of the EAJA, separating "award" and "to the prevailing party" from "fees and costs," as if the subject of the award were unrelated, and then leaps to the conclusion that because the "award" is made to the prevailing party, the EAJA requires "payment" to the prevailing party.[47] The Commissioner's brief then

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[47] Commr.'s Br. 15-16.

argues that if EAJA awards of attorney's fees and costs must be used to pay the fees and costs the court awarded, he would be required to make direct payment to each person whose services or costs are included in the EAJA award, and even to resolve disputes among professionals over payment.[48] But this argument is undermined by the Commissioner's actual practice.

The Commissioner asserts that a decision by the Court that requires him to assure that the EAJA attorneys-fee award pays the attorney's fee, instead of paying government debts, would cause him a great administrative burden.[49] But paying the prevailing class members in class actions would be a greater burden. An EAJA attorneys-fee award in a single class action case would potentially generate more EAJA payments than many years of EAJA checks in all other Social Security cases. For example, *amici* CLS successfully represented a class comprised of 452,000 members, as noted above on page 4; the Commissioner's assertion that sending payment to the attorney instead of the party would cause problems could not have considered the administrative burden of paying fees to all class members. But the Commissioner's assertion that sending attorneys-fee awards to the attorney would cause problems is

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[48] Commr.'s Br. 19-20.

[49] Commr.'s Br. 19-20.

neither realistic nor consistent with his current practice.

The experience of the *amici* is that the Commissioner correctly pays EAJA awards the same way judgments are satisfied routinely in most civil litigation: the payment – if any is left after taking offsets – is sent to the party's attorney, whether the party or the attorney is the payee. The party's attorney then is responsible for paying the appropriate people. The Commissioner has acknowledged this practice, saying "the EAJA fee check, although payable to Plaintiff, will be sent to his counsel."[50] And in this case he has not suggested or implied that he will stop sending the EAJA-fee check to the attorney, even if it is reduced to recover government debts.

The Commissioner's argument also conflicts with his public statements on the agency's web site, which acknowledge that the Commissioner pays EAJA attorneys-fee awards to the attorney: "[the EAJA] [a]uthorizes an attorney to obtain reimbursement of expenses incurred (*e.g.*, legal fees, expert witness fees, etc.)."[51]

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[50] Commissioner's Surreply opposing EAJA fees, Doc. 24-2, at 4-5, *Braxton v. Astrue*, No. 8:06-cv-02603-SKG (D. Md. Aug. 13, 2007).

[51] Fees For Representation In Proceedings Before A Court, http://www.ssa.gov/representation/rep_fees_before_a_court.htm (last visited Jan. 12, 2010); *see also* HALLEX, § I-1-2-91, http://www.socialsecurity.gov/OP_Home/hallex/I-01/I-1-2-91.html (last visited Jan. 12, 2010).

Whether or not the Commissioner may offset EAJA attorneys-fee awards to recover debts instead of paying the fees, there is no reason to change the Commissioner's current practice of sending a single payment to the party's attorney regardless of whether the party or the attorney is the payee.

B. Even if EAJA attorneys-fee awards were paid to the prevailing party initially, federal regulations treat the prevailing party as a representative payee for the attorney, and do not authorize the offset that occurred here.

The Commissioner's brief makes an unwarranted assumption when it argues that EAJA attorneys-fee awards may be offset for the debts of the prevailing party. While the Commissioner is correct in saying that payments under the EAJA are not exempted from the Debt Collection Improvement Act (DCIA), the Commissioner's brief did not consider that the EAJA doesn't award the party monetary damages, but attorney's fees. If the party were to receive the awarded attorney's fees, it would only be for purposes of paying the attorney. While the payment would not be exempt from offset, it would be subject to offset only for the debts of the attorney.

An attorneys-fee award under the EAJA awards the party the right to have his attorney paid. A party's right to have his attorney's fee paid is not a general asset which can be tapped for discretionary purposes, but is made for a specific purpose vital to

the mission of the courts. But once that award is converted into money by being paid (or made payable) to the attorney, it ceases to be "an award" of attorney's fees, and becomes a payment subject to the DCIA. And even if the EAJA attorneys-fee award were paid to the party, it would be only for the purpose of paying the attorney's fee, so the party would serve only as a representative payee for the attorney, who has the beneficial interest in the payment.

This interpretation of the DCIA is supported by the regulations published by the Secretary of the Treasury. The DCIA regulations provide,

> If a payment is made to a person solely in that person's capacity as a representative payee for another person having the beneficial interest in a payment, the disbursing official shall offset that payment only to collect debts owed by the person having the beneficial interest in the payment. Payment agencies are responsible for identifying representative payees.[32]

Here, if the party were to receive the attorneys-fee award, it would be only as a representative payee for the person the payment was intended for – here, the attorney. So any offset taken must be for debts of the attorney, not the party. This gives effect to both the EAJA and the DCIA, by considering the party

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[32] 31 C.F.R. § 285.5(b), (e)(5) (2009).

whose fees are awarded to be the representative payee for the attorney, and permitting offset only for debts of the attorney. Under the Commissioner's interpretation, the Government would not be able to offset an EAJA fee where the attorney has a large debt to the Government, but the party has none.

If an EAJA attorneys-fee award were paid to the party, it would be a payment to a representative payee such as described in the Secretary of the Treasury's interpretation of the DCIA's exemptions from the Treasury Offset Program.[53] The Secretary's Standards for Exemption of payments recognize payments "to alternative payees to accomplish the program purpose" and payments "earmarked by statute or regulations for a specific purpose"[54] as the type of payments which should be exempted.

The Secretary's Standards for Exemption reflect that agencies should attempt to avoid offsets which would interfere with the purpose of a payment by directing payment to alternative payees. This supports finding that the district courts have the discretion to direct that attorneys-fee awards be paid to the attorney to assure that the purpose of the payment is effectuated. It also implies that the lack of

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[53] 31 U.S.C. § 3716(c)(3)(B) (2006).

[54] Standards and Procedures for Exemption of Classes of Payments from Centralized Administrative Offset under the Debt Collection Improvement Act of 1996, http://fms.treas.gov/debt/top.html (last visited Jan. 12, 2010).

a statutory exemption for EAJA attorneys-fee award payments is immaterial, because attorneys-fee awards are paid for the explicit statutory purpose of paying attorney's fees. As the Secretary's standards suggest, the purpose of the EAJA could be met by the district court directing payment to the attorney. The best way to effectuate the purposes of both statutes is to direct payment of EAJA attorneys-fee awards to the attorney, or to the prevailing party as the representative payee of the attorney.

The application of the DCIA so as to permit recovery of debts by offsetting EAJA attorneys-fee awards impedes the purposes of both the DCIA and the EAJA. The DCIA was amended in 1996 "To maximize collections of delinquent debts owed to the Government by ensuring quick action to enforce recovery of debts and the use of all appropriate collection tools."[55] It will not maximize collection of delinquent debts to erode the ability of individuals wrongly denied Social Security benefits to get attorneys to represent them, as without representation they will not be awarded the ongoing benefits, and there could be no recovery from those ongoing benefits. It will preserve the purposes of both laws to require that EAJA attorneys-fee awards be used to pay the attorney's fee, as that will improve access to the courts and also assist wrongly-denied individuals

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[55] Debt Collection Improvement Act of 1996, Pub.L. 104-134, § 31001(b)(1996), 31 U.S.C. § 3701 (2006)

to obtain ongoing benefits from which debts may be collected.

CONCLUSION

Amici curiae recommend that the judgment of the court of appeals be affirmed.

Respectfully submitted,

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